

1 IN THE CIRCUIT COURT, FOURTH
2 JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

3 CASE NO.: 97-03522-CA

4 DIVISION: CV-H

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6 ANGELA B. WIDDICK, as personal
Representative of the Estate of
7 ROLAND E. MADDOX, deceased,

8 Plaintiff,

9 vs.

10 BROWN & WILLIAMSON TOBACCO CORPORATION,
a foreign corporation; LIGGETT GROUP,
11 INC., a foreign corporation,

12 Defendants.

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16 PROCEEDINGS held before The Honorable
17 Charles O. Mitchell, Jr., at the Duval County
18 Courthouse, 330 East Bay Street. Jacksonville,
19 Florida, on Thursday, May 21, 1998.

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1 P R O C E E D I N G S

2 May 21, 1998 9:00 a.m.

3 (Proceedings held in chambers; present is

4 Mr. Nyhan, Mr. Riley, Mr. Browning, Ms. Hartley
5 and Mr. Matthews):

6 THE COURT: Good morning.

7 MR. NYHAN: Good morning, Your Honor.

8 MS. HARTLEY: Good morning.

9 THE COURT: All right. I've read the
10 motion.

11 MR. NYHAN: Well, our motion, Judge, seeks
12 to limit Dr. Feingold's testimony to that which he
13 was prepared to offer at the time of his deposition.

14 And specifically we want to preclude him
15 from relying upon any depositions or interviews with
16 family, plaintiffs' family members, coworkers or
17 family physicians because he hadn't read that
18 material at the time he was deposed. He wasn't
19 prepared to testify about it.

20 Second, he testified he hadn't read any
21 internal documents of American Tobacco Company;
22 therefore, he should be precluded from testifying
23 that.

24 Third, he should not be allowed to rely
25 on expert reports not reviewed at the time of his

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1 deposition, and fourth should not be able to rely on
2 any independent review, his review of Mr. Maddox's
3 pathology after the date of his deposition.

4 Bottom line is he was not -- hadn't been
5 prepared on any of those points at the time of his

6 deposition and he shouldn't be allowed to testify
7 about what he's done after that.

8 THE COURT: Did you make a request to
9 redepose him after the American Tobacco Company
10 documents became public record?

11 MR. NYHAN: Well, I'm not aware that --

12 THE COURT: I mean, are these the same
13 documents that were produced in Minnesota? I don't
14 know.

15 MR. NYHAN: They've been out for some
16 time. The point is at the time of his deposition he
17 didn't produce any of that material and said he
18 hadn't read any of it.

19 THE COURT: I don't know about
20 March 23rd --

21 MS. HARTLEY: I need to correct the record
22 on that. That is absolutely not true that
23 Dr. Feingold did not review American Tobacco Company
24 documents.

25 He produced for the defendants stacks of

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1 documents which included American Tobacco documents.
2 He had the Internet up at the time and invited them
3 to ask him anything about any of the documents on
4 there. It is not --

5 THE COURT: I saw that in the motion,
6 okay.

7 MS. HARTLEY: I haven't read the motion,
8 Your Honor. I just wanted to correct that, because I

9 believe that is completely misstating what happened
10 at the deposition with regards to American Tobacco
11 Company documents.

12 THE COURT: Well, let's go down it item by
13 item. I guess I'm more concerned about the specific
14 items, like do you intend to have him testify about
15 the pathology reports? He apparently said he hadn't
16 read them at that point.

17 MS. HARTLEY: The pathology, he had
18 reviewed pathology reports. And one thing I want to
19 point out to Your Honor is after -- as Your Honor
20 knows, the plaintiff's experts are deposed and then
21 the defendant's experts are deposed. The defendant's
22 pathologist was deposed after Dr. Feingold.

23 I don't believe and have never seen any
24 case law that says that the plaintiff's expert cannot
25 read and review the deposition of the defendant's

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1 experts, which naturally come after.

2 THE COURT: I don't have a problem with
3 that.

4 MR. NYHAN: And we're not seeking that,
5 Judge. What we're seeking is to prevent him from
6 testifying about any review of the pathology
7 materials himself that he hadn't done prior to his
8 deposition.

9 MS. HARTLEY: He has reviewed pathology
10 records, which he had done at the time of the

11 deposition.

12 MR. NYHAN: He can testify about records,
13 but not about slides.

14 MS. HARTLEY: Your Honor, I'm not sure if
15 he's going to be testifying about an actual look --
16 looking at the slides.

17 THE COURT: Have you read this?

18 MS. HARTLEY: But he may. No, Your Honor,
19 I haven't.

20 MR. MATTHEWS: Can I make a suggestion?

21 THE COURT: Yes.

22 MR. MATTHEWS: We're intending to read the
23 deposition of Irwin Tucker.

24 THE COURT: Well, that's what I was
25 thinking.

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1 MR. MATTHEWS: Then we have a copy of the
2 deposition of Dr. LeBow, Mr. LeBow. We intend to go
3 ahead with that, so that's going to take the morning.

4 THE COURT: I was going to say, if you want
5 to redepose Dr. Feingold you can start in ten
6 minutes, anytime you want this morning and ask him
7 whatever questions you choose, Mr. Nyhan.

8 MR. NYHAN: Practically, that isn't
9 feasible for me to do that right now. I don't want
10 to miss the presentation to the jury to see how
11 they're responding.

12 All we're asking, Judge, is don't let him
13 testify about the review of the pathology slides.

14 We're not talking about reports or our expert's
15 deposition, just the pathology slides.

16 THE COURT: Well, does he intend to do that
17 or do you intend to have him do that?

18 MR. MATTHEWS: I honestly don't know.

19 THE COURT: We need to find out, because if
20 he doesn't intend to do that, that's something we
21 don't need to worry about if that's not going to
22 happen.

23 MR. NYHAN: Second, he shouldn't be allowed
24 to testify about his review of depositions of family
25 members or interviews of family members, coworkers or

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1 family doctors. He didn't review that. All of that
2 was available at the time.

3 THE COURT: According to your motion, what
4 he hadn't done is received information from
5 Ms. Hartley concerning that.

6 MR. NYHAN: What he had done is received
7 information from Ms. Hartley. And he should be
8 limited to the information that was made available to
9 him as of the time of his deposition.

10 We shouldn't be sandbagged after that,
11 with them holding them before he's deposed and then
12 dumping a lot of stuff on him after he was deposed.
13 That's all we're looking at, Judge.

14 THE COURT: Well, I don't have a problem
15 with you redeposing him, Mr. Nyhan. I don't mean you
16 personally, okay. I have counted at least seven

17 attorneys that are representing Brown & Williamson.

18 And, you know, everyone seems to be working
19 18 hour days. So I don't know if you can pull
20 anybody off of something else to do this.

21 But I guess what I am concerned about, if
22 you depose him and if it's a problem that you cannot
23 or don't have time to confront him, then I can -- we
24 can revisit your motion.

25 MR. NYHAN: All right.

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1 THE COURT: But first we need to know
2 what the doctor is going to testify to that is
3 objectionable, not what he might testify to or what
4 he might say.

5 I just think that's a better way to do it.
6 And I don't know that it requires your presence
7 there, even though you would probably like to be
8 there.

9 MR. NYHAN: Why don't we hear from them and
10 then we will pursue it later.

11 MS. HARTLEY: That's fine. I know -- I can
12 tell you that he will be testifying to internal
13 company documents and that he did review those prior
14 to his deposition.

15 THE COURT: Well, what I'm picturing, if
16 you depose him this morning, you ask him which ones.
17 And if they're documents that were not produced at
18 the deposition and they were not documents that were

19 produced at your expert's deposition, then --

20 MR. NYHAN: How about if they give us those
21 documents that they claim he's going to rely upon and
22 then we can make a decision of where to go?

23 THE COURT: From Mr. Maddox specifically, I
24 wouldn't have a problem with that. But what I have a
25 problem with, if he is presented as an expert on lung

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1 cancer, and I assume that's why they have him here,
2 it would -- I am assuming it would take a truckload
3 to bring all the documents to present to you that
4 he's relied on, because he's relying on all of his
5 experience from his entire medical career.

6 MR. NYHAN: That's really not what we're
7 talking about, Judge.

8 THE COURT: I understand that. And what
9 I'm saying is if you can specifically -- I think that
10 if -- that you are certainly entitled to know which
11 documents, that are specific to this case, he's
12 relied on, like Mr. Maddox's medical records and even
13 the facts of his smoking.

14 Although, I'm not as concerned as you
15 apparently are whether Ms. Hartley told him that
16 Mr. Maddox smoked two packs a day or whether he got
17 it out of the deposition. I think he can rely on
18 those facts to give his opinion. And you can show on
19 cross-examination that he should -- that they were
20 not reliable, if they weren't.

21 But, so on the case-specific documents, I

22 would -- I would require that they provide them for
23 you or tell them what he used.

24 MR. NYHAN: Your Honor, our motion goes
25 to preventing him from testifying about that

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1 case-specific material not made available to him
2 before his deposition.

3 That's all we're seeking, keep that out
4 because it hadn't been given to him.

5 THE COURT: Mr. Nyhan, but what I'm saying
6 is the same thing. We just need to take one more
7 step.

8 You need to identify that and then see if
9 you have an argument with it. They then can argue
10 that he did provide it at the time or whatever. We
11 can have a hearing after the deposition.

12 MR. NYHAN: Sure.

13 THE COURT: Go ahead.

14 MR. NYHAN: I'm sorry, Judge. What we did
15 argue in the motion is they hadn't given him any
16 depositions of family members or any of the fact
17 witnesses. Therefore, since they didn't give it to
18 him prior to his deposition and have him review it,
19 we shouldn't be forced now either to take his
20 deposition or to allow him -- he shouldn't be allowed
21 to testify about stuff that they withheld from him
22 prior to his deposition. That's the fact witness
23 stuff.

24 THE COURT: The reason I say take his
25 deposition, I want to -- I want a clearer picture

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1 in order to rule on your motion of what specific
2 documents you're talking about.

3 MR. NYHAN: Okay. Perhaps they could
4 simply identify that.

5 THE COURT: They may be able to do that.
6 But I'm talking about you can have the opportunity to
7 take his deposition, if you wish.

8 On the other hand, if they identify
9 the documents and you have no problem with those
10 documents either because they were provided before
11 the deposition or at the deposition or it doesn't
12 matter to you because of the nature of the documents,
13 then we can go on from there.

14 But I'm having difficulty saying -- in
15 making general rulings that you can't use any
16 documents that you didn't produce at the deposition.
17 And I don't know what those documents are, but you
18 can't use them.

19 Now, we can talk about what they are and
20 identify them and, if we do, even if you have to
21 depose Dr. Feingold to identify them, but I don't
22 know that that's necessary, then I can determine
23 should this document be used, and hear argument on
24 both sides and make a ruling.

25 MR. NYHAN: But we have got a simple issue.

1 Is Dr. Feingold going to rely upon depositions of
2 family members and interviews of fact witnesses not
3 made available, which he hadn't reviewed prior to his
4 deposition.

5 THE COURT: It may be simple. But it
6 doesn't seem, you know, you say in your motion -- and
7 I haven't heard from them yet. But you say in your
8 motion that he states in his deposition that any
9 facts concerning Mr. Maddox he got from Ms. Hartley
10 or Mr. Wilner, whatever, but from the attorneys.

11 MR. NYHAN: Right.

12 THE COURT: I don't think that that
13 precludes him from testifying to those facts that he
14 got from Ms. Hartley and Mr. Wilner.

15 MR. NYHAN: I agree.

16 THE COURT: So I don't know what they are,
17 you know. I mean, if you have specific objections
18 that they didn't tell him something that he could
19 have gotten from Mrs. Maddox's deposition and maybe
20 did later get from Mrs. Maddox's deposition, then I
21 can make a ruling on that specific area.

22 MR. NYHAN: That's specifically what we're
23 asking you to rule upon.

24 THE COURT: Then I have to know what we're
25 talking about.

1 MS. HARTLEY: Right, Your Honor. And
2 I think we can solve this after. Go in and start the
3 deposition of Tucker, Floyd can talk with Woody, and
4 this can be resolved. If it can't be resolved, they
5 can depose Dr. Feingold. If it can't be resolved --
6 these two depositions will take us to lunch. And
7 then we will argue before Your Honor.

8 THE COURT: For the record, Dr. Feingold is
9 available now, right?

10 MS. HARTLEY: Yes.

11 THE COURT: For you to talk to and for you
12 to depose?

13 MR. MATTHEWS: I've got the videotape of
14 LeBow. I'll give that to Stephanie.

15 MS. HARTLEY: We will start with Tucker and
16 get this trial going.

17 MR. NYHAN: With respect to the American
18 documents, if they can identify which documents he's
19 going to be talking about, then we can determine if
20 we're going to have an argument. See, the problem
21 with this core dump of documents, they're saying find
22 it on the Internet. You can't do that in a
23 deposition.

24 THE COURT: I don't think that's
25 unreasonable to give them a general list of --

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1 MS. HARTLEY: There's -- I'm sorry.

2 THE COURT: I'm assuming something that I

3 don't know is true, that the American documents were
4 those that were recently produced.

5 MS. HARTLEY: Some were not recently
6 produced.

7 THE COURT: Well, I'm talking about at
8 least the ones that were recently produced in
9 Minnesota.

10 And, you know, I know you've been round and
11 round this with Judge Weatherby. He's talked to me
12 about it, so I'm familiar with some of it. And we
13 even discussed the possibility, or at least y'all did
14 with him, of delaying the trial if there were too
15 many of the Minnesota documents involved because of
16 the volume of them. And apparently that's already
17 been disposed of.

18 But I don't think it's unreasonable to give
19 them a list of the Minnesota documents, for lack of
20 a better -- the American Tobacco Company, Minnesota
21 documents, for lack of a better term.

22 MS. HARTLEY: Well, Your Honor, I can tell
23 you right now that --

24 THE COURT: That Dr. Feingold has seen and
25 used.

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1 MS. HARTLEY: -- Dr. Feingold has seen all
2 the American Tobacco Company that are on the Blilley
3 web site on the Internet. They don't want him to be
4 able to rely upon those, I think that's impossible.

5 You can't go into somebody -- a doctor's
6 head and say, you know, I want you to take this
7 series -- this information and pretend like you
8 never saw it.

9 In addition, if they ask him on
10 cross-examination whether he saw this document, just
11 because he didn't see that document at the time of
12 the deposition, does that mean he's supposed to say
13 no, when, I mean, that would be against his oath?

14 The documents that we will introduce
15 through Dr. Feingold, which will be the evidence of
16 his trial -- at his trial, are the ones we have
17 identified to them already in the books. He is --
18 we are not going to introduce additional documents
19 through Dr. Feingold. But that doesn't mean that he
20 hasn't read them.

21 And if he's asked on cross-examination if
22 he's read a certain document that was on the Blilley
23 March 20, whenever they were -- those documents were
24 posted on the Internet, he's certainly going to
25 answer that he did read it and that he is prepared to

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1 comment on it.

2 THE COURT: You said asked on cross?

3 MS. HARTLEY: If he's asked on cross about
4 that.

5 MR. NYHAN: I think that's the issue.

6 MS. HARTLEY: Right. I'm just saying this
7 is the point that we're not --

8 THE COURT: Y'all aren't going to intend to
9 ask him on direct?

10 MS. HARTLEY: We are not going to introduce
11 documents on direct that may not have been provided
12 to them.

13 THE COURT: All I'm saying is documents you
14 intend to discuss with Dr. Feingold on direct
15 examination, you need to give them a list. You just
16 told me you have already done that.

17 MS. HARTLEY: Yes, we have, Your Honor.

18 MR. NYHAN: Your Honor, they have given us
19 notebooks full of a number of documents, including
20 many of which are privileged. And I guess we will
21 get to that at some point.

22 MS. HARTLEY: Your Honor, we made a lot of
23 progress on the privileged documents. Jackie Terry
24 sent me a list, we deleted some. There, at the
25 moment, doesn't seem to be a problem. We agreed on

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1 the few books that we would introduce. Some have
2 privilege, some don't have privilege.

3 You know, I have discussed that with your
4 colleague. And I don't think there is a problem.

5 MR. NYHAN: I have not had an opportunity
6 to discuss it with her. I understand that we are
7 not going to use -- you're not going to use any
8 privileged documents this morning?

9 MS. HARTLEY: No, because we're reading the

10 deposition of Dr. Tucker and LeBow. So there won't
11 be any documents.

12 MR. NYHAN: So we will have to take it up
13 later.

14 THE COURT: Then I can focus on the
15 motion. But what I'm hearing is they don't intend to
16 introduce some of the documents that you're concerned
17 with.

18 MR. NYHAN: Right. And then, Floyd, you'll
19 get back to me on this other issue?

20 MR. MATTHEWS: Right.

21 MR. NYHAN: I think we have resolved that
22 for the moment, Your Honor.

23 THE COURT: Then are you ready to proceed?
24 You need about five minutes?

25 MR. MATTHEWS: Yes, let me give her the

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1 tape.

2 THE COURT: I'll be around in about five
3 minutes.

4 (In-chamber proceedings concluded;
5 proceedings resumed in open court)

6 THE BAILIFF: All rise, please. This Court
7 is back in session. Please be seated.

8 (Side-bar conference, Court and counsel)

9 THE COURT: Are you ready to proceed,
10 Ms. Hartley or Mr. Matthews?

11 MS. HARTLEY: Yes, Your Honor.

12 THE COURT: Which one is going to do it?

13 MR. MATTHEWS: She's going to do it. I'm
14 going to run back to the office.
15 MS. HARTLEY: Can I have Sean go and sit in
16 the --
17 THE COURT: Yes, but let's wait till you
18 call the witness. Mr. Cronin, you can have a seat at
19 the counsel table. It doesn't matter.
20 MR. CRONIN: Thank you, Your Honor.
21 THE COURT: Are you ready? Just let me
22 know when you're ready.
23 MR. NYHAN: Yes, we are all set.
24 THE COURT: Bring them in, please.
25 (Jury enters courtroom)

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1 THE COURT: Good morning, ladies and
2 gentlemen. Again, I apologize to you for the delay.
3 The attorneys and I had something come up that we
4 were working on. So I'm sorry to keep you back
5 there. But we didn't anticipate doing that and we
6 will try to avoid it in the future.
7 Call your next witness, please,
8 Ms. Hartley.
9 MS. HARTLEY: Your Honor, we call Irwin
10 Tucker. We will read the deposition of Irwin Tucker
11 taken July 28th.
12 Sean Cronin of our office will be reading
13 the part of Irwin Tucker, who was in the research
14 department of Brown & Williamson Tobacco Company. As

15 I said, the deposition was taken July 28th, July 29th
16 and October 24th of 1997.

17 THE COURT: All right. Again, ladies and
18 gentlemen, you are to treat this testimony just as if
19 Dr. Tucker were sitting on the stand today answering
20 the questions. Of course, Mr. Cronin is going to
21 read his answers.

22 (The following transcript was read):

23 Q Would you please state your full name for
24 the record, sir.

25 A Irwin W. Tucker.

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1 Q Mr. Tucker, as I understand it you're a
2 chemist, correct?

3 A Yes.

4 Q All right. Do you have any training as a
5 medical doctor?

6 A No.

7 Q Are you licensed to practice medicine?

8 A No.

9 Q Do you claim to be an expert in the causes
10 of lung cancer?

11 A No.

12 Q Do you claim to be an expert in the field
13 of epidemiology?

14 A No.

15 Q Have you ever conducted an epidemiologic
16 study?

17 A No.

18 Q Have you ever conducted any studies
19 concerning a relationship between cigarette smoking
20 and lung cancer?

21 A No.

22 Q Do you consider yourself to be a
23 statistician?

24 A No.

25 Q It's my understanding, sir, that you went

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1 to work at the Liggett & Myers Tobacco Company at
2 some point in time; is that correct?

3 A Yes.

4 Q Could you tell me when you went to work for
5 Liggett & Myers?

6 A 1948.

7 Q How long did you work there?

8 A About two years.

9 Q When you first went to work for Liggett &
10 Myers, what was your job position?

11 A I was a bench chemist.

12 Q What do you mean when you say bench
13 chemist?

14 A Well, I worked in the laboratory and
15 conducted chemical experiments.

16 Q Was it better to have a low nicotine level
17 or a high nicotine level?

18 A No, nicotine was considered a flavor
19 component.

20 Q Nicotine was considered a flavor component
21 of tobacco?

22 A Yes.

23 Q Was it better to have a higher level of
24 nicotine in the tobacco or a lower level of nicotine
25 in the tobacco?

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1 A No, I think just one intermediate level.

2 Q If nicotine was a flavorant in cigarettes
3 and an advantage because of its good flavor, was
4 there any reason why nicotine wouldn't be maximized
5 to maximize the good flavor of the cigarette?

6 My question to you is if the nicotine was a
7 flavorant advantage, that is it made the cigarette
8 taste better, why would not a higher nicotine content
9 be advantageous in the flavoring of the cigarette?

10 A Well, I think if you tend to get it too
11 high, it makes the cigarette stronger.

12 Q What do you mean when you say stronger?

13 A A fuller taste.

14 Q Pardon?

15 A A heavier taste.

16 Q A heavier taste?

17 A Yes.

18 Q Was mildness something that you, as a
19 chemist, strived for when you worked for Liggett
20 & Myers, mildness in cigarettes, that is?

21 A Yes.

22 Q What was the purpose of blending tobaccos

23 in the production of cigarettes?

24 A To come up with a distinctive taste of the
25 smoke.

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1 Q Did it also make the product smoother?

2 A Yes.

3 Q Did anyone employed by Liggett & Myers ever
4 discuss with you any association between cigarette
5 smoking and lung cancer?

6 A No.

7 Q To your knowledge, was any research
8 conducted by Liggett while you were employed there
9 concerning any adverse health effects from smoking
10 their cigarettes?

11 A No.

12 Q To your knowledge, did Liggett ever fund
13 any such research?

14 A They may have with Arthur D. Little in
15 Boston.

16 Q I was asking, really, to your knowledge.

17 Do you have any knowledge of them ever
18 funding any research concerning the health effects of
19 smoking and their cigarettes?

20 A No.

21 Q During the time that you worked there, are
22 you aware of any attempts by Liggett & Myers to
23 advise its customers that several researchers had
24 found cigarette smoking to be a significant factor in
25 the production of lung cancer?

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1 A No.

2 Q When you were working for Liggett during
3 the period of 1948 through 1952, did Liggett continue
4 its efforts to make smooth, good-tasting cigarettes?

5 A Yes.

6 Q Are you aware of any research which ever
7 showed that Liggett cigarettes were safer than any
8 other cigarette?

9 A No.

10 Q At some point in time, did you become
11 employed at the Brown & Williamson Tobacco Company?

12 A Yes, sometime later.

13 Q Is that in April of 1953?

14 A Yes.

15 Q Can you tell me what product Brown &
16 Williamson Tobacco Company made?

17 A They made Viceroy cigarettes and a Kool,
18 Kool.

19 Q Viceroy and Kool?

20 A Yes.

21 Q Did they make any other tobacco product, to
22 your knowledge?

23 A I think they made a cigarette called
24 20 Grand.

25 Q What was your position when you began your

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1 employment at B&W?

2 A Director of research.

3 Q Did you serve as the director of research
4 for Brown & Williamson from 1953 until you left there
5 in 1960?

6 A Yes.

7 Q And were you hired for that position by Tim
8 Hartmett?

9 A Yes.

10 Q At the time he hired you, was he the
11 president of Brown & Williamson?

12 A Yes, he was.

13 Q Was it your assumption in the manufacture
14 of cigarettes that it would be inhaled?

15 A Yes.

16 Q Was part of the design of the cigarette to
17 enhance the ability of the user to inhale it?

18 A Yes.

19 Q What were your job duties as director of
20 research at Brown & Williamson?

21 A Well, we had certain quality control tests
22 going on and also development, improvement of
23 filters.

24 Q When you began working at Brown &
25 Williamson in 1953, were any of their cigarettes

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1 filtered?

2 A Yes.

3 Q Which one?

4 A The Viceroy.

5 Q Was Kool filtered at the time?

6 A No.

7 Q Was there any belief at Brown & Williamson

8 when you began working there in 1953 that a filtered

9 cigarette was a safer cigarette than a nonfiltered

10 cigarette?

11 A Would you mind repeating the question?

12 Q Yes, sir.

13 When you began working at Brown &

14 Williamson in 1953, were you aware of any belief by

15 anyone at Brown & Williamson that filtered

16 cigarettes, such as their brand Viceroy, were safer

17 than unfiltered cigarettes such as their brand Kool?

18 A No.

19 Q Throughout the time that you were employed

20 at Brown & Williamson, did anyone ever express to you

21 a belief that filtered cigarettes were safer than

22 nonfiltered cigarettes?

23 A No.

24 Q Were your job duties at Brown & Williamson

25 -- did they also involve the inspection of tobacco?

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1 A Yes.

2 Q Was it similar to what you had done at

3 Liggett & Myers?

4 A Oh, we had a much more involved program at
5 Brown & Williamson.

6 Q Would you explain the difference to me,
7 please, sir.

8 A Well, we, we actually went out to farms and
9 -- before making of our year's crop, and sampled the
10 tobacco and analyzed it.

11 Q Were you again analyzing it for sugar
12 content and nicotine content?

13 A Yes.

14 Q So you had a choice between selecting a
15 leaf with low nicotine or one with high nicotine; is
16 that correct?

17 A Yes.

18 Q And as an employee of Brown & Williamson,
19 you would make that decision, you personally?

20 A By and large, yes, with the -- with the
21 concurrence of other executives.

22 Q All right, sir. And did you also inspect
23 the tobacco for sugar?

24 A Yes.

25 Q Anything else that you would inspect the

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1 tobacco for?

2 A No.

3 Q How was the tobacco for Brown & Williamson
4 cigarettes processed?

5 A Well, it was brought to the stemmery and
6 separated from the stems and then put into hogs'

7 heads for aging.

8 Q Can the processing of tobacco alter its
9 nicotine content?

10 A Yes.

11 Q Did you monitor the nicotine content
12 throughout the processing of the tobacco?

13 A Yes.

14 Q Did you make decisions between high and low
15 nicotine throughout the processing of tobacco?

16 A Yes.

17 Q You attended a meeting in December of 1953
18 at the Plaza Hotel; am I correct?

19 A Yes.

20 Q And at that meeting there had gathered a
21 number of CEOs from the major tobacco companies in
22 this country, correct?

23 A Yes.

24 Q Were the other CEOs that were present at
25 that meeting -- did they express any knowledge

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1 concerning the statistical studies that had been done
2 regarding cigarettes and lung cancer?

3 A I can't recall any specific. But I'm sure
4 they, they -- they all shared a common view that they
5 were not significant.

6 Q And that's what the meeting was about, was
7 it not, to discern or discuss the industry's
8 response --

9 A Right.

10 Q -- to those studies?

11 A Yes, those studies and others.

12 Q The mice study?

13 A Yes.

14 Q Mouse study.

15 Any others beside the statistical studies

16 and the mice study?

17 A No, that's it.

18 Q In 1954, were you aware of any statistical

19 studies that concluded that cigarette smoking was not

20 associated with lung cancer?

21 A I can't recall.

22 Q Did the Hill and Knowlton firm have

23 anything to do with arranging of the meeting at the

24 Plaza Hotel in 1953?

25 A I'm not -- I don't think they had anything

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1 to do with the arranging the meeting.

2 Q They were in attendance at the meeting,

3 were they not?

4 A Yes, at some point.

5 Q At what point?

6 A After the presidents met and they decided

7 to entertain proposals from public relations

8 organizations.

9 Q And they -- did the presidents ultimately

10 retain the Hill and Knowlton firm?

11 A Yes.

12 Q Did the presidents decide at that meeting
13 that they would -- that there would be a joint effort
14 undertaken by the tobacco industry to address the
15 publicity problem?

16 A Yes.

17 Q After the TIRC was formed at the Plaza
18 Hotel --

19 A Yes.

20 Q -- did it obtain office space somewhere?

21 A I think it was provided by Hill and
22 Knowlton.

23 Q It's in the same building as Hill and
24 Knowlton?

25 A I think so, yes.

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1 Q Did they have any employees, the TIRC, I
2 mean?

3 A No.

4 Q Did they have people that performed staff
5 work at their offices?

6 A At Hill and Knowlton's offices?

7 Q Well, they were in the building of Hill and
8 Knowlton, I understand.

9 Were they actually in the office of Hill
10 and Knowlton?

11 A In close proximity.

12 Q And Hill and Knowlton supplied the
13 employees, didn't they?

14 A Yes.

15 Q Who did Mr. Hamner work for?
16 A American Tobacco Company.
17 Q And Mr. Parmelee?
18 A Lorillard.
19 Q Mr. Duploy?
20 A Philip Morris.
21 Q And Grant Clark?
22 A RJ Reynolds.
23 Q Who served on the TIRC from Hill and
24 Knowlton?
25 A I don't know if they considered them a

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1 member of the ITC.
2 Q They were at the meetings, weren't they?
3 A Usually, yes.
4 Q Who normally was there?
5 A Tom Hoyt.
6 Q You were the chairman of ITC, correct?
7 A Yes.
8 Q And one of the functions of the ITC was to
9 locate a chairman of the scientific advisory board?
10 A Yes.
11 Q Well, was one of the important attributes
12 of such a chairman, that is of the scientific
13 advisory board, that he be competent?
14 A Yes.
15 Q How was competence determined?
16 A Determined by his history of scientific

17 activities.

18 Q You wanted somebody that was knowledgeable
19 in science?

20 A Yes.

21 Q And medicine?

22 A Medicine?

23 Q Epidemiology?

24 A Yes.

25 Q Was one of the other requirements that they

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1 have an open mind?

2 A Yes.

3 Q What was meant by having an open mind?

4 A Not having any fixed position with respect
5 to whether or not smoking of cigarettes caused lung
6 cancer.

7 Q How would you go about determining if a
8 doctor had an open mind?

9 A Just by questioning him.

10 Q If you were questioning a doctor and he
11 indicated that he was of the opinion that the studies
12 that had been done regarding the association between
13 cigarette smoking and lung cancer were valid, at
14 least on their face, would that disqualify him?

15 A Well, that wouldn't indicate he had an open
16 mind.

17 Q That would indicate that his mind was
18 closed on the subject?

19 A Yes.

20 Q Who conducted the interviews regarding the
21 chairmanship of the scientific advisory board?

22 A Myself, Bob Duploy and Grant Clark.

23 Q Did you ultimately choose Dr. Little for
24 that position?

25 A Yes, when it was Cook Little.

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1 Q And he had -- had he published any research
2 on lung cancer?

3 A I don't recall specifically.

4 Q Had he published any research concerning
5 cigarette smoking?

6 A Not to my knowledge.

7 Q Had he published any epidemiologic studies
8 at all?

9 A I would expect so.

10 Q Was he an epidemiologist?

11 A I really don't recall that specifically.

12 Q How did he demonstrate to you that he had
13 an open mind?

14 A He had been a university president and he
15 operated the Jackson Memorial Hospital Research
16 Facility up in Maine.

17 Q Did you talk to him about the Wynder
18 studies?

19 A Yes.

20 Q Did he say that he -- did he read them?

21 A I'm sure he did.

22 Q Did he agree with them?
23 A I'm sure he found exception.
24 Q Pardon, sir?
25 A I'm sure he found exception to them.

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1 Q He took exception to those?
2 A Yes, to some facets of them.
3 Q Did he take exceptions to them even before
4 he was selected as a chairman of the scientific
5 advisory board?
6 A I believe so.
7 Q How many doctors did you interview for the
8 chairmanship?
9 A Three or four.
10 Q How did you get the three or four names to
11 interview?
12 A They were suggested by various members of
13 the ITC.
14 Q Mr. Hoyt was involved with the selection
15 process with Dr. Little, as the chairman of the
16 scientific advisory board, wasn't he, sir?
17 A Yes.

18 (Change of reporter, 9:45 a.m.)

19
20
21
22
23
24

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1 Q Was Mr. Hoyt a doctor?

2 A No.

3 Q Was he a scientist?

4 A No.

5 Q Was he a statistician?

6 A No.

7 Q He was a public relations man, wasn't he,
8 sir?

9 A Yes.

10 Q You were the chairman and then became a
11 member of the ITC, am I correct?

12 A Yes.

13 Q And the purpose of the ITC, one of its
14 purposes, was to provide information to the
15 Scientific Advisory Board concerning what
16 ingredients were placed in cigarettes, correct?

17 A Just a general information regarding the
18 manufacturing and the nature of the final product.

19 Q All right, sir. And that information was
20 provided then to the researchers who were evaluating
21 those cigarettes to determine whether or not they
22 cause cancer?

23 A Yes.

24 Q And I believe you previously testified
25 that that was an important information for

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1 researchers to have?

2 A Yes.

3 Q Did you -- well, let me go back to 1953
4 when you joined Brown & Williamson. It was a while
5 ago, wasn't it?

6 A Yes.

7 Q And you came to work as a researcher for
8 Brown & Williamson?

9 A Yes.

10 Q Now, when you were hired as director of
11 research, who did you report to?

12 A Tim Hartmett.

13 Q Directly to the head guy?

14 A Yes.

15 Q Now, one of the things that researchers
16 have to do is they have to read scientific
17 literature, right?

18 A Yes.

19 Q They have to be aware of it, right?

20 A Yes.

21 Q And you were instructed that it was
22 important for Brown & Williamson to keep abreast of
23 the medical and scientific literature on cigarettes?

24 A I don't recall that specifically, but in
25 general, yes.

1 Q Regardless of whether you were instructed,
2 did you understand it to be something the company
3 was obligated to do?

4 A Yes.

5 Q And who at the company was obligated to
6 review the medical and scientific literature
7 relating to cigarettes? Is that your job?

8 A That was my job.

9 Q Did you delegate that to anyone else
10 during the time you were at Brown & Williamson, or
11 did it remain your responsibility?

12 A Yes, but I had several assistants later.

13 Q How about in 1953, did you have
14 assistants?

15 A No.

16 Q So in 1953 was there anyone but you who
17 had -- who had the ultimate responsibility of
18 keeping abreast of the medical and scientific
19 literature about cigarettes?

20 A No, there was no one else.

21 Q Did you have on your staff a medical
22 doctor familiar with, an expert, in the treatment of
23 human disease?

24 A No.

25 Q Did you have on your staff an

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1 epidemiologist?

2 A No.

3 Q Did you have on your staff a statistician?
4 A No.
5 Q You've told us previously that you do not
6 claim expertise in epidemiology and statistics; is
7 that right?
8 A Right.
9 Q So when papers on epidemiology and
10 statistics were brought to your attention, what did
11 you do?
12 A Did the best I could.
13 Q When you got there in 1953, did you go to
14 the main library -- to the medical library, to any
15 library, to research the question of whether Brown &
16 Williamson products were safe for human consumption?
17 A No.
18 Q You didn't go and even look to see what
19 the medical literature was on whether Brown &
20 Williamson's products were safe?
21 A 70 million people were using it, using
22 them.
23 Q So 70 million people were using, and how
24 many were getting sick and dying?
25 A A small fraction.

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1 Q Well, how many, sir?
2 A I don't know specifically how many.
3 Q Wait. You said that -- you thought that
4 you didn't need to go look at the literature to see
5 whether the products were killing people because 70

6 million people were using them, right?

7 A Yes.

8 Q Did Brown & Williamson have on the
9 premises a medical library?

10 A No.

11 Q Okay. Now, when you -- in 1953 what tests
12 did Brown & Williamson Tobacco Company do to verify
13 that its products were safe, if any?

14 A Just the historical records.

15 Q Well, let's be a little more specific, if
16 we can. Do you -- did you do any tests yourself to
17 determine whether the products were safe?

18 A No, other than smoke them myself.

19 Q You smoked them?

20 A Yes.

21 Q And you think that that was your way of
22 determining whether they were safe?

23 A Well, in part.

24 Q So you think that you -- that that was a
25 scientific evaluation of the product for you -- was

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1 for you to smoke it?

2 A In part.

3 Q In part; is that right?

4 A Yes.

5 Q So the scientific method that you were
6 using was what? Would you describe for me the
7 experiment?

8 A We had a taste laboratory --
9 Q Yeah.
10 A -- in which people were put in a booth and
11 given various samples to --
12 Q Uh-huh (affirmative).
13 A -- compare.
14 Q Okay. So how would that determine whether
15 a product was safe?
16 A Well, if they were unsafe, there might
17 have been a reaction.
18 Q Okay. And what if somebody got cancer 30
19 years after smoking, how would you know that?
20 A Well, obviously you're not going to tell
21 from one taste test what's going to happen 30 years
22 from now.
23 Q Do you know what a latency period is?
24 A Yes.
25 Q What is it?

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1 A It's a time before something shows up.
2 Q Okay. And did you ever read any articles
3 about how long it typically is between the time that
4 someone is exposed to a carcinogen and the time the
5 cancer developed?
6 A No.
7 Q Now, let's go back to these tests. So
8 Brown & Williamson conducted taste tests of its
9 cigarettes, right?
10 A Right.

11 Q And people were asked to smoke them, and
12 if they had a bad reaction, then you might know
13 something was wrong with the cigarette, right?

14 A Right.

15 Q How long did you look at these people
16 after they smoked it?

17 A It was a revolving panel.

18 Q Okay. And how long did you follow up with
19 these people?

20 A Several years.

21 Q All right. Other than this taste testing,
22 what tests did Brown & Williamson do while you were
23 there to verify or establish the safety of its
24 products?

25 A Well, some of the consumers occasionally

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1 wrote in, commented.

2 Q Consumers wrote in and commented on what?

3 A On their opinion of the cigarettes.

4 Q Okay. And you kept a file on those?

5 A Yes.

6 Q Other than these write-ins from the
7 consumers and the taste tests, did Brown &
8 Williamson at the time that you were there conduct
9 any tests on its products to determine whether it
10 was safe for human consumption?

11 A No.

12 Q Now, when you attended the meeting in 1953

13 or '54 -- the first meeting at the Plaza Hotel,
14 right?

15 A Yes.

16 Q Did you have in your possession -- let me
17 get this straight, bear with me.

18 Did you have in your possession
19 comprehensive and authoritative scientific material
20 which completely refuted the health charges made
21 against the industry?

22 A No.

23 Q Did you ever suggest to Brown & Williamson
24 Tobacco Company that they conduct tests on the
25 biologic species to determine whether cancer could

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1 be induced by elements in the cigarette smoke?

2 A No.

3 Q Did you review in 1953 the results of
4 Doctors Wynder and Graham's experiments where
5 cigarette tar was applied to the backs of mice?

6 A Yes.

7 Q And cancer was induced?

8 A Yes.

9 Q Did Brown and Williamson attempt to
10 duplicate or verify these procedures in its own
11 laboratories?

12 A No.

13 Q Did you -- at the time you read the 1953
14 Wydner-Graham results, did you yourself conclude
15 that the experimental procedures had been flawed?

16 A Yes. I believe that they had a
17 supersensitive mouse that they were using, and
18 the -- the application of condensed tobacco smoke
19 was unrealistic.

20 Q Unrealistic in what way?

21 A In that -- that's not the way a human
22 being would be confronted with the assault.

23 Q Were any modifications or design changes
24 done on the Viceroy or Kool product from 1953 until
25 1960, the time you were there, which modifications

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1 or design changes were specifically made to reduce
2 the hazards of the product, if any, to the
3 consumer?

4 A Well, the filters were constantly being
5 tested for improvement.

6 Q Okay. So filters were being tested?

7 A Yes.

8 Q Okay. That's one. Is there anything
9 else?

10 A Well, I think the paper was modified.

11 Q Okay. How was it modified?

12 A To burn slower or faster.

13 Q Which one, slower or faster, or both?

14 A Maybe to burn faster.

15 Q Okay. And was this done in an attempt to
16 reduce the hazard of the product to the consumer?

17 A Maybe in the public's mind.

18 Q Well, let's first say in the mind of the
19 designers of the product, what was done in your mind
20 to reduce the hazard of the product?

21 A No.

22 Q Okay. You said "in the public's mind."
23 So was the public informed that the paper had -- was
24 changed?

25 A No.

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1 Q Paper has a certain porosity, and as a
2 puff is taken on the cigarette a certain amount of
3 air is drawn through the paper and not through the
4 growing coal -- excuse me.

5 Okay. And do you -- is it your testimony
6 that the public or the consumers believed that the
7 change in paper made the product safer?

8 A I'm not sure that the public would be
9 aware of it.

10 Q Okay. I understand that. But why did the
11 designers at Brown & Williamson make the paper or
12 change the paper so it burned faster? What was the
13 intent of their -- or their goal in doing this?

14 A Well, by this time there were periodic
15 reports being made in the "Reader's Digest" of the
16 amount of tar and nicotine in the various brands
17 and --

18 Q Okay.

19 A And there was an attempt to reduce the
20 amount of tar and nicotine that was -- that was

21 constituted in condensed smoke.

22 Q Okay. So the increasing rate of the
23 burning paper had the effect of reducing the tar and
24 nicotine in the inhaled smoke?

25 A Yes.

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1 Q Doctor, you testified earlier today that
2 you attended the meeting of the tobacco company
3 executives in late 1953 after publications came to
4 your attention regarding the possible relationship
5 between smoking and health issues; is that correct?

6 A Yes.

7 Q And that meeting resulted, Doctor, in the
8 formation of the Tobacco Industry Research
9 Committee, did it not?

10 A Yes.

11 Q Now, the tobacco industry funded the
12 Tobacco Industry Research Committee, did it not?

13 A Yes.

14 Q And it funded that committee to conduct
15 research on smoking and health issues, did it not?

16 A Yes.

17 Q Was Brown & Williamson one of the
18 companies that funded research by the TIRC?

19 A Yes.

20 Q Was Phillip Morris one of the companies
21 that funded research by the TIRC?

22 A Yes.

23 Q Was the American Tobacco Company one of

24 the companies that funded that research?

25 A Yes.

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1 Q Was P. Lorillard one of the companies that
2 funded that research?

3 A Yes.

4 Q Was Reynolds one of the companies that
5 funded that research?

6 A Yes.

7 Q Was it the intention, Doctor, of the
8 founders of the TIRC that research would be
9 conducted by eminent independent researchers?

10 A Yes.

11 Q Isn't that correct, that they would
12 conduct their research in well-equipped
13 laboratories?

14 A Yes.

15 Q Wasn't it the intention of the founders of
16 the TIRC that research would be conducted on a wide
17 variety of issues?

18 A Yes.

19 Q And was the research to cover a variety of
20 subjects?

21 A Yes, but focused primarily on cancer.

22 Q Were the researchers, Doctor, to have a
23 variety of different kinds of expertise?

24 A Yes.

25 Q Can you describe that in more detail for

1 us?

2 A Only wanted medical capability,
3 competence, and only scientific competence --

4 Q Uh-huh (affirmative).

5 A -- chemistry, physics or statistics.

6 Q And were the researchers conducted with
7 outside academic and medical institutions?

8 A Yes.

9 Q What kinds of institutions were these
10 researchers conducted with -- connected with?

11 A Universities and institutes.

12 Q Can you remember any of the names of the
13 universities?

14 A No, I can't.

15 Q Well, do you recall the name Harvard
16 University?

17 A Yes.

18 Q Do you recall the name of any of the
19 academic institutions?

20 A I think University of California.

21 Q Yes, sir. Would it be fair to say,
22 Doctor, that there was also similarly credentialed
23 universities in the United States?

24 A Yes.

25 Q Were the researchers people who had

1 associations with these institutions?

2 A Yes.

3 Q And they maintained those relationships
4 with the institutions during the course of their
5 research --

6 A Yes.

7 Q -- for the TIRC?

8 Doctor, I think you already -- you also
9 testified about the Scientific Advisory Board?

10 A Yes.

11 Q And the role that you played in the
12 selection of the Scientific Advisory Board.

13 What were the reputations generally of the
14 people that were selected to serve on the Scientific
15 Advisory Board?

16 A Well, they were highly qualified and well
17 recognized in their professions.

18 Q Did they also maintain relationships with
19 the scientific and educational institutions?

20 A Yes.

21 Q Can you give us any examples?

22 A Well, Clarence Cook Little, who was
23 associated with Roscoe Jackson Laboratory in Maine.

24 Q And I think you also testified earlier,
25 Doctor, that he had been the president of a major

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1 American university?

2 A Yes.

3 Q Do you recall which University he had been
4 the president of?

5 A I think one of the universities of
6 Michigan.

7 Q All right. Tell us something about the
8 expertise of the individuals who served on the
9 Scientific Advisory Board.

10 A Well, Clarence Cook Little had been
11 president, I think, of the American Cancer Society,
12 cancer research.

13 Q And were there other people who served on
14 the scientific advisory board who had similar levels
15 of expertise?

16 A Yes.

17 Q Did the members who served on the
18 Scientific Advisory Board also come from a variety
19 of different academic disciplines?

20 A Yes.

21 Q Did that include medical doctors?

22 A Yes.

23 Q Did it include statisticians?

24 A Yes.

25 Q Do you recall a Dr. Wilson from Harvard

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1 University?

2 A Yes.

3 Q What do you know about him?

4 A Well, he was highly regarded in the field

5 of statistics.

6 Q Was he an epidemiologist?

7 A I'm not sure.

8 Q All right. Now, did Brown & Williamson
9 fund research into the relationship between smoking
10 and health which was funded through and approved by
11 the Scientific Advisory Board of the TIRC?

12 A Yes.

13 Q So it's true, is it not, Doctor, that
14 through the TIRC Brown & Williamson funded a great
15 variety of researches into these important questions
16 of smoking and health?

17 A Yes.

18 Q All right. Now, Doctor, I think you
19 testified that the fact that people smoke and don't
20 get cancer is evidence in your mind that smoking
21 does not cause cancer; is that correct?

22 A Yes, it is.

23 Q Do you have any idea of the number of
24 people -- and you're thinking about your own
25 thoughts about this issue -- how many people smoke

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1 who don't get cancer?

2 A Well, it -- about ten years ago it was 70
3 million.

4 Q 70 million people?

5 A Yes.

6 Q Did that fact that 70 million smoked and

7 don't get cancer influence your thinking on this
8 issue?

9 A Yes.

10 Q That you testified about earlier today.

11 Okay. Doctor, I think you also testified
12 that during the period of your time that you were
13 employed with Brown & Williamson that
14 Brown & Williamson did not publish nicotine values
15 on the packages of cigarettes that it sold?

16 A No.

17 Q Do you know whether Brown & Williamson was
18 attempting to defraud anybody by not putting those
19 values on their cigarette packs?

20 A No.

21 Q Sir?

22 A No, they did not want to defraud anyone.

23 Q I think you also testified that Brown &
24 Williamson did not publish tar values on the packs
25 of cigarettes they sold at the time you were

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1 employed by Brown & Williamson?

2 A No, they didn't.

3 Q Is that right?

4 In not doing so, sir, did they attempt to
5 defraud anybody in your view?

6 A No, they didn't.

7 Q Doctor, you also testified that during the
8 course of the employment that you had with Brown &
9 Williamson there was no publication of all of the

10 ingredients on the sides of packs of the cigarettes
11 sold by Brown & Williamson?

12 A No.

13 Q Is that correct?

14 When Brown & Williamson did that, sir, to
15 the best of your knowledge and belief, was Brown &
16 Williamson trying to defraud anybody?

17 A No.

18 Q Did you ever, Doctor, knowingly put an
19 ingredient or cause to be put an ingredient in a
20 Brown & Williamson cigarette which you believe would
21 be harmful to a member of the American public?

22 A No, I didn't.

23 Q Okay. Are you a doctor, an
24 epidemiologist?

25 A No.

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1 Q Are you a statistician?

2 A No?

3 Q You an M.D.?

4 A No.

5 Q Have you ever personally performed smoking
6 and health research?

7 A No.

8 Q Doctor, earlier you testified about the
9 Industry Technical Committee, the ITC?

10 A Yes.

11 Q And you testified that you, as a member of

12 the ITC, provided information to the Scientific
13 Advisory Board about cigarettes; is that correct?

14 A Yes.

15 Q And that was about the construction of
16 cigarettes?

17 A Yes.

18 Q Did you in providing this information
19 include specific ingredient information of Brown &
20 Williamson Tobacco Corporation?

21 A No, I did not.

22 Q Did that include specific information of
23 Phillip Morris?

24 A No.

25 Q Did it include specific ingredient

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1 information of Reynolds?

2 A No.

3 Q Did that include specific ingredient
4 information of P. Lorillard?

5 A No.

6 Q Did that include specific ingredient
7 information of the American Tobacco Company?

8 A No.

9 Q Did you provide any specific formulas of
10 the Brown and Williamson Tobacco Corporation to the
11 Scientific Advisory Board?

12 A No, I didn't.

13 Q Did you provide any such information
14 relating to Phillip Morris?

15 A No.

16 Q American Tobacco?

17 A No.

18 Q P. Lorillard?

19 A No.

20 Q Any other tobacco company?

21 A None.

22 Q Did you provide any other information that

23 you considered to be a trade secret to the

24 Scientific Advisory Board?

25 A No, I didn't.

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1 Q Did you provide any such information to

2 anybody else at the CTR?

3 A No.

4 Q When you provided this information

5 regarding the construction of cigarettes then, what

6 was the general nature of that information?

7 A Just that they be cognizant of the general

8 nature of additives applied and the purpose for

9 them.

10 Q I see. Without any specifics?

11 A No.

12 Q Mr. Tucker, you understand that you're

13 still under oath, sir?

14 A Yes, I do.

15 Q And you understand the nature of that

16 oath?

17 A Yes.

18 Q On cross-examination you discussed a
19 meeting that took place at the Plaza Hotel in 1953.
20 Do you recall that testimony?

21 A Yes, I do.

22 Q I want to review with you and make sure
23 who was present at the meeting. I think you already
24 told us that you were at the meeting; is that
25 correct?

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1 A Yes.

2 Q And was -- I think you may have already
3 told us that Mr. Hartmett, the president of Brown &
4 Williamson, was at the meeting?

5 A Yes.

6 Q Was Paul Hahn, the president of American
7 Tobacco Company, at the meeting?

8 A Yes, he was.

9 Q And was a Mr. Hamner, director of research
10 of American Tobacco Company, at the meeting?

11 A Yes.

12 Q What was Mr. Hamner's first name?

13 A Hiram.

14 Q Did the president of Phillip Morris attend
15 the meeting?

16 A My recollection of that is a little hazy.

17 Q Do you recall testifying previously that
18 he attended the meeting?

19 A Yes, I thought.

20 Q Do you think he was there or not, sir?

21 A Yes.

22 Q And do you remember his name?

23 A Hugh Coleman.

24 Q Was Robert DuPuis, the director of

25 research of Phillip Morris, in attendance at the

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1 meeting?

2 A Yes.

3 Q Did president of R. J. Reynolds also

4 attend the meeting?

5 A Yes.

6 Q Do you recall his name?

7 A No.

8 Q Do you recall whether or not a research
9 director from R. J. Reynolds attended this meeting?

10 A I'm not sure he was research director, but
11 he represented the technical.

12 Q Did the president of Lorillard Tobacco
13 attend the meeting?

14 A Yes.

15 Q And did Hugh Parmelee, the research
16 director of Lorillard, attend the meeting?

17 A Yes.

18 Q At the time the meeting took place, if I
19 recall correctly, it was December of 1953, correct?

20 A Yes.

21 Q And at the time the meeting took place,

22 were the presidents aware of Dr. Wynder's research
23 which had been published concerning the cigarettes
24 and lung cancer?

25 A Yes.

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1 Q And you personally read Dr. Wynder's
2 studies?

3 A Yes.

4 Q Do you recall having read a study
5 published in the journal of the American Medical
6 Association entitled "Tobacco Smoking as a Possible
7 Etiological Factor in Bronchiogenic Carcinoma"
8 published by Dr. Wynder in 1950?

9 A Yes.

10 Q Do you recall the following statement
11 being made in that paper by Dr. Wynder: Quote, "The
12 suggestion that smoking, and in particular cigarette
13 smoking, may be important in the production of
14 bronchogenic carcinoma has been made by many writers
15 on the subject, even though well-controlled and
16 large scaled clinical studies are lacking."

17 Do you recall that?

18 A If it was in that article, I did at the
19 time.

20 Q Do you recall these conclusions by
21 Dr. Wynder after he set forth his study in that
22 article: Quote, "Excessive and prolonged use of
23 tobacco, especially cigarettes, seems to be an
24 important factor in the induction of bronchogenic

25 carcinoma."

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1 You may answer, Doctor. Do you recall
2 that statement being made?

3 A What statement?

4 Q The following statement: "Excessive and
5 prolonged use of tobacco, especially cigarettes,
6 seems to be an important factor in the induction of
7 bronchogenic carcinoma"?

8 A Yes.

9 Q Do you recall the following conclusion
10 also being made by Dr. Wynder: Quote, "Among 605
11 men with bronchogenic carcinoma, other than
12 adenocarcinoma, 96.5 percent were moderately heavy
13 to chain smokers for many years."

14 Do you recall that statement being made in
15 the article?

16 A Yes.

17 Q Sir, was the purpose of the 1953 meeting
18 to formulate a joint industry response to the
19 medical research that had found that cigarette
20 smoking was an important factor in the development
21 of lung cancer?

22 A I didn't understand that question.

23 Q Let me rephrase it.

24 Again, I'm talking about the meeting that
25 took place at the Plaza Hotel in New York in 1953.

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1 Was the purpose of that meeting to formulate a joint
2 industry response to the medical research that had
3 found that cigarette smoking was an important factor
4 in the development of lung cancer?

5 A Yes, it was.

6 Q How long did that meeting last, sir?

7 A Two days.

8 Q Did the presidents who were in attendance
9 at that meeting discuss various actions the industry
10 could take in response to the medical research which
11 had been published?

12 A Yes.

13 Q Were any of the researchers who had
14 published the ten studies referenced by Dr. Wynder
15 in his 1953 article, were any of those researchers
16 invited to the meeting at the Plaza Hotel in New
17 York in 1953?

18 A Not to my knowledge.

19 Q Were any of the doctors in attendance at
20 that meeting?

21 A Are you speaking of M.D.s?

22 Q Yes, sir, medical doctors.

23 A No.

24 Q Were any statisticians present at the
25 meeting?

1 A No.

2 Q Were any epidemiologists present at the
3 meeting?

4 A No.

5 Q Sir, in 1953 were you aware of any
6 published research which had not found that
7 cigarette smoking did not cause lung cancer?

8 A No.

9 Q Did anyone at the meeting at the Plaza
10 Hotel in 1953 claim that there was published
11 research that showed that cigarettes did not cause
12 lung cancer?

13 A Not to my knowledge.

14 Q Did they take any action whatsoever at the
15 1953 meeting to ensure that cigarettes they
16 manufactured were not provided or sold to minors?

17 A No.

18 Q Did they even discuss the potential health
19 consequences to children who might use their pro- --
20 cigarettes?

21 A No.

22 Q At the meeting in 1953 did the presidents
23 take action to create the Tobacco research --
24 Industry Research Committee?

25 A I don't follow the question.

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1 Q Okay. Let me ask it this way: At the
2 meeting at the hotel, the Plaza Hotel in 1953, did

3 the presidents create what became known as the
4 Tobacco Industry Research Committee?

5 A Yes.

6 Q Did the TIRC utilize the public relations
7 firm of Hill & Knowlton?

8 A Yes.

9 Q Now, sir, you served as a chairman of what
10 was known as the ITC, correct?

11 A Yes.

12 Q The ITC was the Industry Technical
13 Committee; am I correct?

14 A Yes.

15 Q And back in 1954 you were personally
16 involved in interviewing doctors to determine if
17 they were appropriate for service on what became
18 known as the SAB; am I correct?

19 A Yes.

20 Q And the SAB was the Scientific Advisory
21 Board; is that correct?

22 A Yes.

23 Q And the Scientific Advisory Board was
24 created by the presidents at the meeting in 1953 at
25 the Plaza Hotel, correct?

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1 A Yes.

2 Q Did you ever contact Dr. Wynder about
3 serving on the SAB?

4 A No.

5 Q Why not?

6 A Wynder had already committed himself.

7 Q Because he had done research on the
8 relationship between cigarette smoking and lung
9 cancer?

10 A Well, because he -- his pronouncements.

11 Q In reviewing his work, did you believe
12 that he was knowledgeable concerning the subject of
13 any association between cigarette smoking and lung
14 cancer?

15 A No.

16 Q You did not believe that he was not
17 knowledgeable on the subject matter?

18 A No.

19 Q Did you contact Richard Doll concerning
20 whether or not he would be willing to serve on the
21 SAB?

22 A No.

23 Q And why didn't you contact Dr. Doll?

24 A He was far away.

25 Q Did you ask him whether or not he would be

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1 willing to travel to take care of whatever duties he
2 might have at the SAB?

3 A No.

4 Q Was he qualified to serve on the SAB?

5 A I would think so, yes.

6 Q Did you contact Dr. Alton Ochsner
7 concerning whether or not he would be willing to

8 serve on the SAB?

9 A No.

10 Q And why didn't you contact Dr. Ochsner?

11 A He had already stated his position.

12 Q Do you believe that Dr. Ochsner was

13 knowledgeable in the area of whether or not

14 cigarette smoking was associated with lung cancer?

15 A Yes.

16 Q Did you contact Dr. Hammond to determine

17 whether he would be willing to serve on the SAB?

18 A Doctor who?

19 MR. RILEY: Your Honor, I'm sorry to

20 interrupt. Can I just get a page number?

21 MS. HARTLEY: 37.

22 MR. RILEY: Thank you.

23 Q You're familiar with Dr. Hammond's work,

24 aren't you, sir?

25 A Tyler Hammond?

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1 Q Yes.

2 A No.

3 Q Why didn't you contact Dr. Hammond?

4 A I don't recall.

5 Q Let me go back to the time that you

6 were -- that you attended the 1953 meeting where the

7 TIRC was initiated.

8 MR. RILEY: Your Honor, can I interrupt

9 for a second?

10 THE COURT: Do you want to approach the

11 side bar?

12 MR. RILEY: Yes, Judge.

13 (Side bar, Court and counsel)

14 THE COURT: Ladies and gentlemen, I'm
15 going to ask you to step back in the jury room for
16 about five minutes. We'll bring you right back
17 out. All right. We'll take about a five-minute
18 recess. They're going to compare depositions.

19 (Jury exits the courtroom)

20 (Short recess)

21 THE COURT: Do you think you have it
22 straightened out?

23 MS. HARTLEY: Yes, Your Honor.

24 THE COURT: All right. As soon as the
25 clerk comes back, we'll start again.

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1 Are you ready to proceed, Mr. Riley?

2 MR. RILEY: Yes, Your Honor.

3 THE COURT: Was the problem a
4 misunderstanding about what was out or in?

5 MS. HARTLEY: I think because Dean and I
6 had done the designations this was an area that --
7 it was late last night, as Your Honor knows, when we
8 were doing it and Tom and I had not coordinated it.

9 MR. RILEY: We're all set.

10 THE COURT: All right. We need the
11 clerk. I guess we can go ahead and start without
12 the clerk. That's not a problem, if you're ready to

13 proceed.

14 MS. HARTLEY: We're ready, Your Honor.

15 THE COURT: All right.

16 Mr. Nyhan?

17 MR. NYHAN: We're ready, Your Honor.

18 THE COURT: Bring them in, Mr. Backer.

19 And the clerk, he can come and go as he pleases,

20 so....

21 All right. Ms. Hartley, you may proceed

22 whenever you're ready.

23 MS. HARTLEY: May it please the Court.

24 Q Dr. Tucker, what was your knowledge on the

25 hazards of Brown & Williamson cigarettes at the time

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1 you attended the meeting in 1953?

2 A I didn't consider them hazardous.

3 Q Okay. Were you aware of whether or not

4 carcinogens had been identified in the smoke of

5 cigarettes as of this 1953 meeting?

6 A No, they had not been.

7 Q When was the first time Brown & Williamson

8 laboratory identified carcinogens in cigarette

9 smoke?

10 A Never did, to my knowledge.

11 Q Now, was the existence of carcinogens in

12 tobacco smoke of interest to the scientific people

13 on the TIRC?

14 A Yes.

15 Q Was it of interest to you in 1953 whether,

16 in fact, there were carcinogens in tobacco smoke?
17 A Yes.
18 Q What research did you conduct to ascertain
19 whether there were carcinogens in tobacco smoke as
20 of 1953?
21 A I done none.
22 Q Is it true that in 1953 you represented
23 the knowledge available or obtained by the Brown &
24 Williamson Tobacco Company?
25 A Yes.

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1 Q Dr. Tucker, let me ask you, sir, do you
2 know what a polynuclear aromatic compound is?
3 A Yes.
4 Q And did you as a chemist, working for
5 Brown & Williamson, do research on polynuclear
6 aromatic compounds?
7 A I did it prior to being at Brown &
8 Williamson.
9 Q All right. Did you do any while you were
10 at Brown & Williamson?
11 A No.
12 Q All right. Do you know some examples of
13 polynuclear aromatic compounds?
14 A Yes, diphenyl and triphenyl.
15 Q Diphenyl and triphenyl?
16 A Yes.
17 Q Do you know what a benzopyrene is?

18 A Yes.

19 Q Also known as BAP?

20 A Yes.

21 Q Did you, while you were at Liggett, do
22 research into benzopyrene content of cigarette
23 smoke?

24 A No.

25 Q Did you do it while you were at Brown &

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1 Williamson?

2 A No.

3 Q Did you do it while you were in the
4 Technical Committee advising the TIRC?

5 A No.

6 Q Did you have access, while you were in the
7 Technical Committee advising the TIRC, of whether
8 any information that provided or suggested that
9 benzopyrene was a carcinogen found in cigarette
10 smoke?

11 A No, I didn't.

12 Q What are the pyrolytic products of
13 tobacco? Do you know what the word means,
14 pyrolytic?

15 A Yes.

16 Q Yes.

17 Mean -- means formed in the burning of
18 tobacco, correct?

19 A Yes.

20 Q Did you, while you were at Brown &

21 Williamson, inspect the pyrolytic compounds of
22 tobacco?

23 A No.

24 Q As of 1953 were you aware of any source of
25 whether benzopyrene and n-benzopyrene had been

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1 identified in the distillate cigarette smoke -- of
2 tobacco smoke?

3 A No.

4 Q Do I fairly understand that you are of the
5 belief that such compounds had not been identified
6 in the distillate of tobacco smoke?

7 A Yes, that's correct.

8 Q Did you know whether or not the compounds,
9 benzopyrene and n-benzopyrene, were carcinogens,
10 whether or not they had been identified in cigarette
11 smoke?

12 A Yes, I had known them to be carcinogenic.

13 Q And would it have been important to you to
14 know in 1953, when the meeting occurred at the Plaza
15 Hotel, whether or not carcinogenic compounds had
16 been identified in cigarette smoke?

17 A Yes.

18 Q Now, you were asked by attorneys for
19 Brown & Williamson whether you, by virtue of being
20 an advisor to the TIRC, set in motion a method by
21 which scientists would be doing research on
22 cigarette-related issues. Is that a fair statement?

23 A Yes.

24 Q And we previously talked about your
25 efforts and your committee's efforts to select a

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1 director, a scientific director, for the Scientific
2 Advisory Board of the TIRC?

3 A Yes.

4 Q Did you have any -- do you personally have
5 any -- have any involvement in the selection of the
6 Scientific Advisory Board members?

7 A Yes.

8 Q And was one of the members of the TIRC
9 Dr. Paul Cotin?

10 A Yes.

11 Q Did you know Dr. Cotin?

12 A Yes.

13 Q And did you understand Dr. Cotin to be an
14 eminent and respected scientist?

15 A Yes.

16 Q What was Dr. Cotin's responsibility as a
17 member of the Scientific Advisory Board?

18 A The same as all the other members.

19 Q Which was?

20 A To select and recommend the support of
21 research proposals.

22 Q And did some of those research proposals
23 also involve people who were themselves members of
24 the Scientific Advisory Board?

25 A It might well have.

1 Q Can you point to any specific tests or
2 recommendations that came from the Scientific
3 Advisory Board that affected the design of Brown &
4 Williamson products?

5 A No.

6 Q Were you aware of whether Dr. Cotin
7 published a paper in the 1950s that stated
8 "cigarettes cause cancer"?

9 A No.

10 Q Did you make it a point to read the
11 publications of the people on the Scientific
12 Advisory Board when they published on the issue of
13 cigarettes and disease?

14 A No.

15 (Change of reporter, 10:25 a.m.)

16

17

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25

1 Q I have a few copies of this one. Let me
2 hand you a periodical publication entitled "The Role
3 and Action of Environmental Agents in the
4 Pathogenesis of Lung Cancer II Cigarette Smoke" by
5 Paul Cotin, M.D. and Hans L. Falk. Do you see that?

6 A Yes. It says Hans Falk, Ph.D.

7 Q Let me direct your attention to page 257
8 under the first paragraph beginning comment. Let me
9 read you the statement and then ask whether you
10 agree or disagree. Under comment, the first
11 paragraph, the statement is made by Dr. Cotin,
12 member of the Scientific Advisory Board of TIRC,
13 quote, The statement recently made by a study group
14 appointed to examine the scientific evidence of the
15 effects on tobacco smoking on health to the effect
16 that, quote, the sum total of scientific evidence
17 establishes beyond a reasonable doubt that cigarette
18 smoking is a causative factor in the rapidly
19 increasing incidence of human epidermoid carcinoma
20 of the lung, end quote, representing more or less
21 universally accepted viewpoint with which we
22 concur.

23 Do you see that, Bennett?

24 A Yes, I see it.

25 Q Did Dr. Cotin ever address the TIRC in

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1 your presence and state these words or words to that

2 effect that he concurred with the pronouncement of
3 the Medical Research Council of Great Britain to the
4 effect that cigarette smoking was a causative factor
5 in cancer of the lung? Doctor, I'm only asking you
6 whether Dr. Cotin ever addressed the Scientific
7 Advisory Board in your presence?

8 A No.

9 Q All right, and did you ever ask Dr. Cotin
10 what his views were on whether cigarettes caused
11 cancer?

12 A No.

13 Q All right. Did the views of Dr. Cotin,
14 were they given to the public through any
15 pronouncement of TIRC to your knowledge?

16 A No.

17 Q His statement let me represent to you
18 appeared in a publication which was received for
19 publication May 15, 1959, published sometime in
20 1960. Now, you were at Brown & Williamson as of
21 May 15th, 1959, right?

22 A Yes.

23 Q Did Brown & Williamson ever tell anybody
24 that Dr. Cotin believed that cigarettes caused
25 cancer?

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1 A Not to my knowledge.

2 Q Do you know whether Brown & Williamson
3 ever invited Dr. Cotin to the offices of Brown &

4 Williamson while you were there?

5 A No.

6 Q Were you aware that Dr. Cotin was
7 preparing this manuscript which he submitted on
8 May 15, 1959?

9 A No.

10 Q So the TIRC funded research on cigarettes
11 and disease, correct?

12 A Yes.

13 Q And the TIRC paid Dr. Cotin to be on the
14 Scientific Advisory Board, right?

15 A Yes.

16 Q And Dr. Cotin was held out to the world by
17 the TIRC as an eminent and respected scientist who
18 examined the question of whether cigarettes caused
19 cancer, right?

20 A Yes.

21 Q Okay. And then when Dr. Cotin did his
22 research and found out and published that cigarettes
23 caused cancer did TIRC or the cigarette industry or
24 Brown & Williamson tell the public?

25 A Not to my knowledge.

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1 Q Dr. Tucker, could you tell us when you
2 were employed by Brown & Williamson, what years?

3 A From 1953 until 1959.

4 Q After 1959 were you ever employed by Brown
5 & Williamson?

6 A No.

7 Q In your capacity as research director at
8 Brown & Williamson beginning in 1953 tell us what
9 types of research Brown & Williamson conducted
10 internally?

11 A We analyzed tobacco in the processing of
12 tobacco through its various stages en route to being
13 made into cigarettes.

14 Q Did Brown & Williamson conduct in-house
15 research during your tenure relating to smoking and
16 health?

17 A No, it did not.

18 Q Was Brown & Williamson during your tenure
19 equipped to do biological research?

20 A No, it was not.

21 Q Let me ask you this, Doctor, did any of
22 the in-house lawyers at Brown & Williamson ever
23 attempt to influence the research results from your
24 department?

25 A No, they did not.

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1 Q Did any lawyer at Brown & Williamson ever
2 tell you or suggest that you should destroy any
3 research results?

4 A No, they did not.

5 Q Dr. Tucker, I'd like to direct your
6 attention back to the early 1950's. Do you recall
7 during the early '50s that some results of research
8 regarding mouse skin painting appeared in the

9 literature?

10 A Yes, I do.

11 Q Can you tell us generally what those
12 studies were about.

13 A They condensed tobacco smoke and applied
14 that condensed smoke to the backs of mice so they
15 were shaved.

16 Q And do you recall whether these results of
17 these studies in the early '50s were widely
18 publicized?

19 A Yes, they were widely recognized.

20 Q All right, Doctor, let me take you back
21 again to the early 1950's, including 1953 when you
22 went to work for Brown & Williamson. At that time
23 did you personally hold the opinion that smoking
24 caused lung cancer?

25 A No, I did not.

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1 Q Who was the president of Brown &
2 Williamson at the time?

3 A His name was Timothy Hartmett.

4 Q Did Mr. Hartmett ever tell you that he
5 thought smoking caused lung cancer?

6 A No, he did not.

7 Q Doctor, in the aftermath of the
8 publications of these studies involving mouse skin
9 painting, was there an industry meeting scheduled
10 involving Brown & Williamson and other cigarette
11 manufacturers?

12 A Yes, there was.
13 Q Who called that meeting?
14 A It was Paul Hahn.
15 Q Who was Mr. Hahn?
16 A He was president of the American Tobacco
17 Company.
18 Q Is that the meeting which led to the
19 formation of the Tobacco Industry Research Council?
20 A Yes, it was.
21 Q And is the Tobacco Industry Research
22 Council also referred to as the TIRC?
23 A Yes.
24 Q When was that meeting scheduled for,
25 Dr. Tucker?

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1 A I believe it was December of 1953.
2 Q Who were the participants in that meeting?
3 A Timothy Hartmett, Brown & Williamson,
4 American Tobacco Company, Reynolds Tobacco and
5 Philip Morris and Lorillard Tobacco Company.
6 Q Where did that meeting take place?
7 A In the Plaza Hotel in New York.
8 Q Can you tell us the purpose of that
9 meeting, please, sir?
10 A It was to discuss the charges being
11 leveled against smoking and to organize some kind of
12 joint response to it.
13 Q And did you attend the meeting yourself?

14 A Yes, I did.

15 Q Did Hartmett attend the meeting?

16 A Yes, he did.

17 Q Did any lawyers from Brown & Williamson

18 attend that meeting?

19 A No, they did not.

20 Q Do you recall any lawyers from any company

21 being present at the meeting?

22 A No, I do not.

23 Q Dr. Tucker, do you recall whether anyone

24 from the United States Government was invited to

25 attend the meeting at the Plaza Hotel?

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1 A It was my understanding that an invitation

2 was given to them to attend.

3 Q Was that from the U.S. Department of

4 Justice?

5 A It would have been, yes.

6 Q Do you recall why the industry issued an

7 invitation to the U.S. Department of Justice to

8 attend this meeting at the Plaza Hotel?

9 A Well, in 1910 the U.S. Government

10 restrained the industry from joining forces.

11 Q All right. Now, do you recall whether or

12 not an official from the Justice Department actually

13 attended the Plaza Hotel meeting?

14 A No, he did not.

15 Q Do you know why the invitation was not

16 accepted by the Justice Department?

17 A No, I do not.

18 Q Doctor, during the meeting at the Plaza
19 Hotel did any of the representatives of the tobacco
20 companies express a view that they believed smoking
21 caused cancer?

22 A No, they did not.

23 Q Did any of the technical and research
24 directors who were present at the meeting express a
25 view that they believed smoking caused cancer?

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1 A No, they did not.

2 Q Doctor, again, did this meeting result in
3 the formation of the TIRC?

4 A Yes, it did.

5 Q And, Doctor, were the companies, the
6 tobacco companies, were they the members of the
7 TIRC?

8 A Yes, they were.

9 Q Can you tell us the purpose of the
10 formation of the TIRC?

11 A It was in response to these charges being
12 leveled against smoking in relation to health.

13 Q Now, Doctor, did the TIRC itself ever
14 conduct scientific research?

15 A No, not to my knowledge.

16 Q Did the TIRC ever fund research to be
17 performed by others?

18 A Yes, it did.

19 Q And who would conduct the research that
20 was to be funded through the TIRC?

21 A There would be various applicants through
22 the universities or research organizations with
23 facilities and personnel adequate to carry out the
24 research.

25 Q Doctor, if you know, can you tell us why

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1 the Tobacco Industry Research Committee decided to
2 fund outside researchers rather than have the TIRC
3 or the company scientists do it themselves?

4 A Yes, it was felt that any work performed
5 by the industry itself would be suspect.

6 Q All right, and, Doctor, how did the TIRC
7 decide what outside research proposal should be
8 funded?

9 A Well, they proposed a formation of a
10 Scientific Advisory Board. They were largely
11 medical scientists who would receive these
12 applications and review them and make their
13 recommendation.

14 Q Now, did the Scientific Advisory Board
15 include medical doctors?

16 A Yes, it did.

17 Q Statisticians?

18 A Yes.

19 Q And scientists in other areas as well?

20 A Yes.

21 Q Doctor, do you recall the names of any of

22 the members of the Scientific Advisory Board?

23 A Well, the head of it was Dr. Clarence Cook

24 Little.

25 Q Now, Doctor, is it correct that he had

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1 been president of the University of Michigan and the

2 University of Maine?

3 A Yes.

4 Q Do you know what his reputation was as a

5 scientist in the scientific community?

6 A Yes, he was highly regarded.

7 Q Now, was there a Dr. Paul Cotin on the

8 Scientific Advisory Board?

9 A Yes, there was.

10 Q Do you recall where he was from?

11 A From Southern California.

12 Q Was there a Dr. Wilson on the Scientific

13 Advisory Board?

14 A Yes.

15 Q Do you recall what university he was from?

16 A I think he was from Harvard. He was a

17 statistician.

18 Q And are you aware of his reputation in the

19 scientific community?

20 A Yes, I believe he was highly regarded.

21 Q Doctor, let me ask you this question:

22 Were the outside researchers funded through the

23 Scientific Advisory Board free to conduct their

24 research as they saw fit?

25 A Yes, they were.

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1 Q Doctor, was it your understanding that the
2 grant supported by the TIRC through SAB would fund
3 only research favorable to the tobacco industry?

4 A No.

5 Q Well, what was your understanding in that
6 regard?

7 A They would fund any research that bore on
8 the question of smoking and health.

9 Q Doctor, did you ever attempt to influence
10 the result of the research funded by the TIRC?

11 A No, I didn't.

12 Q To your knowledge, did any of the members
13 of TIRC ever attempt to influence the results of the
14 research funded through the TIRC?

15 A Not to my knowledge.

16 Q And, Doctor, would that include -- well,
17 let me ask you this more specifically: To your
18 knowledge, did any other scientist, executive or
19 lawyer from the cigarette companies ever attempt to
20 influence the result of TIRC-funded research?

21 A Not to my knowledge.

22 Q Doctor, let me take you back to the hotel
23 meeting for a minute. In addition to making the
24 decision to fund research was there a discussion at
25 that meeting about retaining a public relations

1 specialist?

2 A Yes, there was.

3 Q And, in fact, was there a representative
4 of the public relations firm of Hill & Knowlton
5 present at the meeting?

6 A Yes.

7 Q Doctor, from your attendance at the Plaza
8 Hotel meeting did you understand that Hill &
9 Knowlton was to publish accurate and truthful
10 information to the American public?

11 A Yes, it was.

12 Q To your knowledge, did anything that Hill
13 & Knowlton did interfere in any way with the
14 research evaluated by the Scientific Advisory Board?

15 A No.

16 Q Doctor, how would you describe the freedom
17 that the SAB had in this regard to their funding
18 decisions?

19 A They were totally free to fund or not
20 fund.

21 Q All right, Doctor, I'd like to turn your
22 attention now to a group called the Industry
23 Technical Committee, all right?

24 A Yes.

25 Q Were you a member of a group called the

1 Industry Technical Committee?

2 A Yes, I was.

3 Q Now, was one of the roles of the Industry
4 Technical Committee to select the members of the
5 Scientific Advisory Board?

6 A Or to make recommendations relative to it.

7 Q All right. Was another role of the
8 Industry Technical Committee to provide data or
9 technical information about the manufacturing
10 processes to the members of the SAB?

11 A Yes, it was.

12 Q By the way, Doctor, did you or any
13 representative of the tobacco company ever conduct
14 any scientific research yourselves through the TIRC?

15 A No, we did not.

16 Q Now, let's talk about your role in the
17 selection or recommendation of SAB members. What
18 guidelines did you employ when you made
19 recommendations for members of the SAB?

20 A We looked for people who had academic
21 accomplishments and were highly regarded in the
22 scientific community.

23 Q Was integrity an issue that you looked at?

24 A Yes.

25 Q As far as you were concerned, was their

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1 smoking status a factor in their selection?

2 A No, it was not.

3 Q Now, Doctor, is it correct or can you tell
4 us, did you in fact invite researchers from the
5 National Cancer Institute to become members of the
6 SAB?

7 A Yes, we did.

8 Q And did they accept?

9 A No, they did not.

10 Q To your knowledge. Did anyone from the
11 firm of Hill & Knowlton ever attempt to influence
12 the type of research or research results that the
13 Scientific Advisory Board through the TIRC funded?

14 A Not to my knowledge.

15 Q To your knowledge, Doctor, did anyone from
16 Brown & Williamson, Reynolds or any other tobacco
17 company ever attempt to influence the type of
18 research or research results that the TIRC through
19 the SAB funded?

20 A No.

21 Q Doctor, in the last session of your
22 deposition some weeks ago you indicated that
23 Brown & Williamson monitored nicotine through the
24 processing of tobacco into cigarettes. Can you tell
25 us why Brown & Williamson monitored nicotine levels?

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1 A Well, nicotine is a basic ingredient of
2 cigarettes and they tried to maintain the uniformity.

3 Q Okay. Now, Doctor, you also testified
4 previously with regard to ingredients in Brown &

5 Williamson cigarettes. Could you tell us during
6 your tenure at Brown & Williamson how many different
7 ingredients were used in Brown & Williamson's
8 products other than tobacco?

9 A Approximately six or eight.

10 Q Can you tell us what percentage of the
11 cigarette was made up of ingredients other than
12 tobacco during your tenure?

13 A I would estimate less than one percent.

14 Q Did you review the scientific literature
15 at the time to determine in your own mind whether
16 these ingredients were harmful at levels used in
17 your products?

18 A Yes, I did.

19 Q And did you make a determination that
20 these ingredients as used were appropriate?

21 A Yes.

22 Q Dr. Tucker, would you have allowed Brown &
23 Williamson to use an ingredient in its product that
24 you thought caused harm to anyone?

25 A No.

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1 Q Dr. Tucker, during your tenure at Brown &
2 Williamson can you tell us whether or not the
3 overall levels of tar and nicotine in Brown &
4 Williamson's products was reduced?

5 A Yes, it was.

6 Q Can you tell us, was this done in part
7 through the selection of tobacco?

8 A Yes, in part.

9 Q Was it done in part through the use of
10 filters?

11 A Yes, it was.

12 Q You testified also earlier with regard to
13 British American Tobacco, an affiliated company of
14 Brown & Williamson, creating a research facility in
15 South Hampton in England. Do you recall that?

16 A Yes, I do.

17 Q Was the South Hampton research facility,
18 was it actually up and running at the time you left
19 the company?

20 A Just barely, yes.

21 Q Now, on occasion did you talk to
22 researchers who worked at that facility in England?

23 A Yes, we did.

24 Q Were you generally aware of what research
25 they were performing?

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1 A Yes, generally.

2 Q Can you tell me generally what that
3 research was about.

4 A Well, it had to do with analyzing tobacco
5 and to formulate blends of tobacco for manufacturer.

6 Q Doctor, during the time that you were at
7 Brown & Williamson, to your knowledge, was the
8 research facility at South Hampton doing research on
9 smoking and health?

10 A No, not to my knowledge.

11 Q Doctor, let me see if we can sum this up.

12 Doctor, what do you say to the allegations that the
13 cigarette manufacturers established the TIRC to fund
14 junk science or to fund only science favorable to
15 the tobacco industry?

16 A That's absolutely not true.

17 Q What would you say, Doctor -- what do you
18 say, Doctor, to the allegation that the cigarette
19 manufacturers retained Hill & Knowlton to mislead
20 the American public about the dangers of cigarette
21 smoking?

22 A That's not true.

23 Q What do you say, Doctor, that the SAB did
24 not exercise independent judgment in evaluating
25 research grants?

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1 A The SAB did exercise independent judgment.

2 Q Thank you, sir. Dr. Tucker, you were also
3 asked by Mr. Wilner in the last session about
4 research published by Dr. Cotin. Was Dr. Cotin free
5 to publish any research he wished?

6 A Yes, he was.

7 Q And are you aware of any effort by any
8 tobacco company or by the TIRC to prevent Dr. Cotin
9 from publishing anything that he wished?

10 A Not to my knowledge.

11 Q Are you aware of anything that would have
12 prevented any of the health organizations from

13 promoting his research?

14 A No.

15 Q Before you came to be deposed was it
16 correct, sir, that you had heard or read things in
17 the press about the tobacco industry?

18 A Yes, I did.

19 Q Was it your belief that what was being
20 said was untrue?

21 A Yes.

22 Q And did you come forward to give your
23 testimony on your own initiative?

24 A Yes, I did.

25 Q Was it your desire to set the record

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1 straight, sir?

2 A Yes.

3 MS. HARTLEY: Your Honor, that's all we
4 have.

5 THE COURT: Would you approach the side
6 bar for just a moment. We don't need the court
7 reporter.

8 (Side bar, Court and counsel)

9 THE COURT: Ladies and gentlemen, we're
10 going to take the mid-morning break. I know you sat
11 back there for a little while and we started late,
12 but it's 20 minutes to 11. I'm going to ask that
13 you be back in the jury room at 11:00 and we'll
14 start right back at 11.

15 (Jury exits courtroom; recess)
16 THE COURT: Are you ready to proceed?
17 MS. HARTLEY: Yes, Your Honor.
18 MR. NYHAN: Yes, Your Honor.
19 THE COURT: I'm assuming that the -- are
20 you going to read the rest of it?
21 MS. HARTLEY: We are going to play the
22 deposition of Mr. Bennett LeBow. The direct was an
23 hour and four minutes, I believe, and then I thought
24 we'd break for lunch and come back and play the
25 other tape.

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1 MR. MATTHEWS: They have not finished
2 their review of cross.
3 THE COURT: I guess I misunderstood.
4 You've completed Dr. Tucker's deposition?
5 MS. HARTLEY: Yes.
6 THE COURT: I thought they had a portion
7 of Dr. Tucker's deposition to read.
8 MS. HARTLEY: I read that, Your Honor.
9 MR. MATTHEWS: So you'll know, I've
10 related to Mr. Nyhan my conversations with
11 Mr. Wilner regarding the documents and I think
12 they're satisfied and there's not a problem with it.
13 MR. NYHAN: This relates to the motion in
14 limine you heard earlier and we resolved that.
15 THE COURT: All right. We will play the
16 first part of the tape. You let me know when you're
17 ready to break for lunch and we'll come back. Who

18 is going to do it?

19 MR. MATTHEWS: They're just going to stick
20 it in and let it run, Judge. I think Stephanie is
21 going to announce it.

22 THE COURT: Okay. That's what I wanted to
23 know. I'll call on her to call the next witness.

24 Are you ready to proceed, Mr. Nyhan?

25 MR. NYHAN: Yes, Your Honor.

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1 THE COURT: Bring them in.

2 (Jury enters courtroom)

3 THE COURT: All right, Ms. Hartley, call
4 your next witness.

5 MS. HARTLEY: Your Honor, we are now going
6 to play the videotape deposition of Mr. Bennett
7 LeBow who is the CEO of Liggett. Can we have the
8 lights dimmed? Is that possible, Your Honor?

9 THE COURT: Okay. Mr. Backer, if you can
10 turn out the lights in the back of the courtroom and
11 leave the ones in the front. I think that worked
12 pretty well -- the other way. Right.

13 THE BAILIFF: Is that all right?

14 THE COURT: I think that will do. Is that
15 better?

16 MR. MATTHEWS: That's fine.

17 (The following video was played in open
18 court.)

19 Q Would you state your full name for the

20 record?

21 A Bennett S. LeBow.

22 Q Mr. LeBow, we met informally. Let me
23 reintroduce myself.

24 My name is Roman Silberfeld, and together
25 with my partners and associates, we represent the

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1 State of Minnesota and Blue Cross/Blue Shield in a
2 lawsuit against the tobacco industry.

3 You understand that, do you not?

4 A Yes.

5 Q We're here today to take your testimony in
6 a number of capacities, really, but principally in
7 terms of your capacity as the owner, if you will, of
8 Liggett Group, all right?

9 A Through another company.

10 Q Through Brook?

11 A Through Brook, right.

12 Q All right. Well, we'll get to all those
13 details in a minute.

14 You have been deposed and you've testified
15 in trial on a number of occasions.

16 Do you think any useful purpose would be
17 served by my going over the ground rules of a
18 deposition with you?

19 A No, I understand.

20 Q Okay, great. What is your educational
21 background?

22 A I have a Bachelor of Science in electrical

23 engineering and a year of graduate school.

24 Q Where did you get the electrical

25 engineering degree?

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1 A Drexel University, Philadelphia,

2 Pennsylvania.

3 Q In what year, sir?

4 A In 1960.

5 Q And there was one year of graduate work?

6 A Yes.

7 Q And in what subject?

8 A Computer and electrical engineering.

9 Q And where was that work done, Mr. LeBow?

10 A Princeton University.

11 Q Did that result in a degree being

12 conferred?

13 A No.

14 Q Is that the extent of your formal

15 educational training?

16 A Yes.

17 Q And did you have the one year of graduate

18 school immediately after getting your Bachelor of

19 Science degree?

20 A Yes.

21 Q So was it in about 1961 that you entered

22 the work force?

23 A That's correct.

24 Q And when you started working, what was

25 your first job?

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1 A In electrical engineering, computer
2 engineering -- or electrical engineering, really, at
3 that time.

4 Q Who did you work for?

5 A General Electric Corporation.

6 Q How long were you with GE?

7 A About six, eight months.

8 Q And then after that, where did you go to
9 work?

10 A U.S. Army.

11 Q And how long were you in the service?

12 A Two years.

13 Q Roughly, 1962 to '64?

14 A That's correct.

15 Q Something in there. And when you came out
16 of the Army, where did you next go to work?

17 A U.S. Army.

18 Q You stayed in?

19 A No, I stayed as a civilian for three
20 years -- three more years.

21 Q While you were in the service, what was
22 your job in the first two years?

23 A I was in charge of computer center in the
24 Pentagon.

25 Q The computer center in the Pentagon?

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1 A Yes.

2 Q And then when you stayed on after your
3 tour of duty, did you have the same job?

4 A No, I became assistant to the -- assistant
5 vice chief of the staff for computers throughout the
6 Army.

7 Q And am I right that that was roughly 1964
8 to '67?

9 A Correct.

10 Q What did you do after that, sir?

11 A I started my own company.

12 Q And what was the name of that company?

13 A DSI Systems.

14 Q And what was the business of DSI Systems?

15 A It was a computer microfilm business.

16 Q You started that company from scratch?

17 A Yes.

18 Q And how long did you have that company?

19 A About three years.

20 Q What happened to the company?

21 A I sold it to another company.

22 Q And after DSI Systems was sold, what did
23 you do for a living?

24 A I became an independent consultant.

25 Q In the area of --

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1 A Everything -- computers, troubled
2 companies -- everything -- finance.
3 Q And this would have been approximately
4 1970?
5 A '71 maybe -- '70, '71 -- no, it was 1970,
6 as a matter of fact. 1970 is correct.
7 Q All right. So it was about 1970 that you
8 became a consultant to both industries and troubled
9 companies and in the general area of finance?
10 A Uh-huh, that's correct.
11 Q All right. And has that been what you've
12 done roughly for the last 27 years?
13 A That's -- roughly, that's correct.
14 Q Okay. Have you over the course of the
15 last 27 years focused on the computer end of
16 business?
17 A Not exclusively, no.
18 Q Did that drop off at some point in terms
19 of an area of interest?
20 A No, we still have some computer
21 interests -- no.
22 Q Okay. Tell the ladies and gentlemen of
23 the jury who will watch this what a troubled company
24 is, as you used that term?
25 A It's a company that has financial problems

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1 or other kind of legal problems or other issues of --
2 that would, you know, that would have investors not
3 be willing to put money into it, something --

4 anything that has problems associated with it,
5 whether it be managing problems or financial
6 problems.

7 Q And when you first started out as an
8 independent consultant in 1970, did you actually
9 acquire companies or did you just consult to them?

10 A The first ten or 15 years I was just --
11 ten years just consulting to them, you know,
12 inquiring sometimes, you know, small interests in
13 the companies. Although, I guess, that's not
14 totally true. Maybe I did acquire some controlling
15 interests in the companies, so both. It was a
16 combination of many things.

17 Q All right. So that we can have some
18 reasonable idea of how all of this evolved, let's
19 just take it in 10-year increments; how's that?

20 A Okay.

21 Q Let's start with the decade of the
22 1970's.

23 A Myself and another partner -- other
24 partners, we did acquire control of troubled
25 companies during those years.

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1 Q Okay. Approximately how many companies?

2 A Somewhere -- without going back and
3 looking at all the details, five to ten, in that
4 range -- maybe closer to five than ten.

5 Q Did any of those companies in the decades

6 of the 1970s have anything to do with the tobacco
7 business?

8 A No.

9 Q And during that time, is it true that you
10 both acquired companies and sold some of the
11 companies you had acquired in that decade?

12 A Possibly. I don't recall exactly.

13 (Change of reporters, 11:10 a.m.)

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1 Q And in addition to acquiring some number of
2 companies, you also consulted for other firms; right?

3 A No, towards the end of the '70s I just pretty
4 much just did the companies I had an interest in--
5 controlling interest in.

6 Q Early in the '70s you would consult with
7 others?

8 A Uh-huh (affirmative).

9 Q Yes?

10 A That's correct.

11 Q And as to some of those firms, you might have
12 acquired a small interest but not a controlling
13 interest?

14 A No. Usually I did consulting with them, or
15 if I did acquire an interest, it was a controlling
16 interest. Maybe not controlling by myself, but with
17 other people controlling interest.

18 Q So that your group --

19 A My group had a controlling interest, yes.
20 Q Got it. And did the practice that evolved by
21 the 1970s, late in the '70s that is, you were acquiring
22 troubled companies and basically consulting or devoting
23 your energies to those firms. Did that continue to be
24 true in the 1980s?

25 A Yes.
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1 Q For the whole decade of the '80s?
2 A Yes.
3 Q In looking at that decade, can you give us a
4 reasonable estimate as to the number of firms that you
5 and your group or your colleagues acquired in that
6 decade?
7 A Again, maybe six to ten, in that range.
8 Q It was in the 1980s that you acquired
9 Liggett; correct?
10 A Correct.
11 Q And we will talk about corporate structures
12 in just a couple of minutes, but focusing on the 1980s,
13 was it in 1986 that you acquired Liggett?
14 A That's correct.
15 Q And as of 1986, Mr. LeBow, about how many
16 companies did your group control?
17 A In 1986?
18 Q Yes.
19 A Maybe two or three others.
20 Q In the 1980s did you do business under either
21 a corporate or a partnership name?
22 A I believe in the '80s -- most of the '80s was
23 under both, partnership and corporate names.
24 Q Which were the names?
25 A Well, the partnership I think was called
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1 Brook Partners, which later on was turned into a
2 corporation.
3 Q And that became what?
4 A Brook Group Limited.
5 Q Were there other names under which you did
6 business other than either group partners or group --
7 A Both. Yeah, there were a couple of other
8 companies. There was a company called LeBow Industries,
9 which owned some other small companies. And then there
10 was other companies I owned and controlled outside of
11 Brook such as MAI Systems.
12 Q What was the business of MAI Systems?
13 A Computer business.
14 Q You owned that in the 1980s?
15 A I owned a controlling interest, yes.
16 Q Taking MAI as an example, what did it mean in
17 terms of your daily activities to own a controlling
18 interest in a firm such as MAI?
19 A Strictly a holding company position. I had
20 no operational control. Or I had no operational duties.
21 Just as a holding company.
22 Q All right. When you say "a holding company,"
23 what do you mean?

1 acquisition by some -- by some bankers.

2 Q As of that time had you had any experience
3 whatsoever in the tobacco industry?

4 A No.

5 Q You understood when these investment bankers
6 brought you this opportunity that Liggett was a tobacco
7 company?

8 A Obviously, yes.

9 Q In deciding whether or not to acquire
10 Liggett, did you engage in a process called "due
11 diligence"?

12 A Not very much, no.

13 Q You understand what that term refers to?

14 A Yes.

15 Q Describe what you understand "due diligence"
16 to me.

17 A To go and check the books and records of the
18 company and verify what's being represented to you.

19 Q So that if somebody tells you, We have a
20 hundred employees, one way of doing due diligence is to
21 ask for the payroll records or the personnel records to
22 see in fact there is a hundred employees?

23 A That's correct.

24 Q Or, conversely, if somebody says, We sold a
25 million dollars worth of product last year, you ask to

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1 see the record that corresponds with that sale. That's
2 due diligence?

3 A Correct.

4 Q And when you said you did very little with
5 respect to Liggett, what did you do, and explain the
6 reasons for doing what you did.

7 A We did almost nothing. I mean, because in
8 this case the seller was a large corporation, and I made
9 the seller represent and warrant all of the information.
10 So, it's the kind of thing you check after the fact.
11 You know, you don't bother checking before the fact to
12 any great extent.

13 Q The seller of Liggett was a company called
14 Grand American?

15 A No, Grand Metropolitan.

16 Q Grand Metropolitan. I'm sorry. It's a
17 British firm?

18 A That's correct.

19 Q Is it a very large firm?

20 A Very large.

21 Q And I take it having acquired companies in
22 the past, there's basically two ways to go about
23 checking out a company. One is to do due diligence in
24 advance; right?

25 A Correct.

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1 Q And the other is to get the seller, in this
2 case Grand Metropolitan, to represent and warrant to you
3 the condition of the company?

4 A That's correct.

5 Q And was that the way you chose when you
6 acquired Liggett?
7 A That's what I did, yes.
8 Q Explain, if you would, what representations
9 or warranties in this kind of a transaction mean?
10 A It means that they guarantee you what they
11 are telling you is correct, that the books and records,
12 you know, say these things. And if it turns out the
13 books and records don't say those, are not correct, then
14 you have recourse back to them to make up the
15 difference.
16 Q So just to use an example, if they had said
17 to you, Mr. LeBow, Liggett makes \$20 million of profit
18 on an annual basis, and you accepted that
19 representation, you buy the company, you come to find
20 out later that it's not 20 million dollars, it's 10
21 million dollars, you would have recourse back against
22 the seller for the 10 million dollars; is that what you
23 are saying?

24 A That's correct, or multiple thereof.
25 Q Or a multiple thereof. And why was it that
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1 you chose the representations and warranties route
2 rather than the due diligence route when you thought
3 about acquiring it?
4 A Well, I almost always do it that way. I --
5 you know, I don't have the staff to do a huge due
6 diligence. It doesn't really mean much anyhow. So
7 that's normally the way I do every deal.
8 Q Did you do any due diligence about Liggett
9 before actually acquiring it?
10 A As I said before, virtually nil. Virtually
11 none. Other than maybe just me and the management, I
12 may have taken a trip down there, see the company, that
13 type of thing. Maybe stayed a day or two there. That
14 was the extent of it.
15 Q Did it appear to you at the time that Liggett
16 was a good opportunity for you?
17 A Yes. Again, you also have to look at the
18 price you are paying. Vis-a-vis the price we are
19 paying, yes, it looked like a good opportunity.
20 Q And why was that? Why did it appear to you
21 to be a good opportunity?
22 A Because we were paying what appeared to be
23 less than the book value.
24 Q What does "book value" mean?
25 A The net worth of the company. The net value

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1 of the company on its -- its assets less its
2 liabilities. So we were paying a little bit less than
3 that value, and we had guarantees from Grand
4 Metropolitan that these numbers were all correct. So
5 the downward risk seemed very small.
6 Q About how long did it take to consummate the
7 transaction from the time the investment bankers first
8 brought it to you until the ink was dry on the
9 agreement?

10 A About two or three months in that time
11 period.
12 Q Had you wanted to do and had the staff to do
13 a full due diligence examination, how long would that
14 have taken?
15 A A month.
16 Q Was there some time pressure associated with
17 the transaction?
18 A Yes.
19 Q And what was that?
20 A They gave us a deadline, the seller, that we
21 had to close by a certain date. They had some reason
22 they wanted to close by a certain date. Exactly what it
23 was I don't recall. That was the only time pressure.
24 It was self-imposed by them.
25 Q And at the time that you acquired Liggett,
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1 did you do anything then in 1986 to determine what it
2 was that Liggett knew about the tobacco products that it
3 sold in terms of their health effects?
4 A No.
5 Q Did you do anything at that time to find out
6 what Liggett knew about the addictive qualities, if any,
7 of its products?
8 A No, I didn't do anything.
9 Q Or how it conducted its advertising?
10 A No, I didn't do anything.
11 Q Or marketing?
12 A No. Again, we did no due diligence.
13 Q And when you acquired the company, it had a
14 management in place, did it not?
15 A Correct.
16 Q Did you keep all those people?
17 A Yes.
18 Q A corporation is typically run by a board?
19 A Actually, it was run by the president and his
20 officers.
21 Q And they answer to a board?
22 A To a board, yes.
23 Q And then when you acquired Liggett, did you
24 acquire one or more seats on the board?
25 A Well, actually, we acquired control of all
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1 the board seats.
2 Q How many board seats were there at Liggett
3 when you took control?
4 A I don't know if there were any. It was a
5 wholly-owned subsidiary of Grand Metropolitan, so I
6 don't know if they had a board. I really don't know.
7 Q When you took control of the company, did you
8 install directors?
9 A Yes.
10 Q And who were the directors?
11 A I don't recall. I am sure I was one of them,
12 and I am sure the president of the company, who was
13 running the company, was one of them. The rest of the
14 directors, I don't recall who they were.

15 Q When you first acquired the company, do you
16 recall any significant management changes in terms of
17 the day-to-day operations of the firm?

18 A No. We made absolutely no changes.

19 Q And how long was that true that management
20 that was there when you acquired it stayed in place?

21 A Well, I think the president stayed a good
22 five years maybe until he retired. I don't recall
23 exactly when he retired. But, you know, I would think
24 it's five or six years later, something in that nature.

25 Q Do you recall who that was?

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1 A Yeah, Mr. K.V. Dey, D-e-y. K, period, V,
2 period, Dey. Last name is Dey, D-e-y.

3 Q Were there a number of vice presidents under
4 Mr. Dey?

5 A Yes.

6 Q Do you recall that some number of them stayed
7 more than a year after you took control of the firm?

8 A They stayed with Mr. Dey all along. Some
9 stayed even after he retired. So exactly when each one
10 left I don't -- you know, I don't recall exactly the
11 timing of it. But most of them, we made absolutely no
12 changes until probably '93 -- '92/'93 after he retired.
13 He retired, I think, in '91, if I had to guess, thinking
14 about it.

15 Q Owning a controlling interest of a company
16 like Liggett, I take it you had the right, if you chose
17 to, to go in and clean house and fire everybody?

18 A The board of directors, which we controlled,
19 had the right, that's correct.

20 Q And if you chose to, you could have gone in
21 and changed policy at Liggett?

22 A Well, no, you change management, and the
23 management change policy.

24 Q In accord with what the board wants?

25 A Yeah, that could be done.

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1 Q And when you acquired Liggett, you left it
2 exactly as it had been the day before you acquired it?

3 A That's correct. We had no reason to even
4 suspect changing anything. We didn't change anything.

5 Q And as far as the day-to-day operations of
6 Liggett was concerned from and after the time you bought
7 it until recently, that firm continued to operate as it
8 had in the prior period of time before you took control?

9 A That's right. That's correct.

10 Q In leaving management in place, did you rely
11 on their background and experience in doing what they
12 had done for Liggett?

13 A They had been there for many, many years.

14 Q How long had Mr. Dey been there?

15 A I don't know, but I am sure, you know, 20,
16 30, 40 years. I mean a long.

17 Q A long time?

18 A A long time. The whole management team had
19 been there a long time.

20 Q So is it true that Brook Group, which owned
21 Liggett, relied on Liggett management to run that
22 business?

23 A Absolutely true.

24 Q Wholly and completely?

25 A Wholly and completely.

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1 Q And is it also true that you relied on
2 Liggett management to make appropriate business
3 decisions about every aspect of the business?

4 A Absolutely. We never got involved at all.

5 Q And is it also true that you relied on
6 Liggett management and their inside and outside counsel
7 to make legal decisions incident to the company's
8 business?

9 A Absolutely true.

10 Q Before 1995 did you ever inject yourself or
11 Brook Group into the day-to-day operations of Liggett?

12 A Temporarily in -- again, I'm guessing -- in
13 late '92 or early '93 we temporarily, myself and one of
14 my partners, we had to get involved because we had a
15 problem with the new management being put in. So we
16 were involved for a few months' period until we found a
17 new manager. About three or four months we were
18 involved.

19 Q And that was at about the time that Mr. Dey
20 left?

21 A Mr. Dey left, and then an individual who was
22 head manufacturing had been there 30 or 40 years was put
23 in charge for about a year, year and a half. And then
24 we got rid of him, and at that point myself and two
25 other people, you know, as a committee was running the

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1 company for a few months until we found a new tobacco
2 executive to come in.

3 Q And that was in -- sometime in '92/'93 time
4 frame?

5 A Maybe I am wrong timewise. Now I'm thinking.

6 No, I take it back. It was later. This
7 was -- no, it was probably '92 -- I would have to go
8 back and check my notes now. I am getting confused with
9 the time frames and the presidents. Yeah, '92/'93.

10 Let me -- let's go back. Mr. Dey, I guess,
11 left -- he must have left earlier, like '90. Then
12 Mr. Turner was there for about a year, year and a half.
13 And then I brought in another group of managers in,
14 nonconsumers experts, consumer product experts for a
15 couple of years to run the company. After they left is
16 when myself and these other two gentlemen went in on an
17 interim basis to run it before we found a tobacco
18 executive.

19 Q Who was the tobacco executive that came in?

20 A Ed Horrigan. And this was in like late '92,
21 early '93.

22 Q In that three- or four-month period of time
23 that you and colleagues ran the company?

24 A As a committee, yes.

25 Q During that time did you make any decisions
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1 that you can recall relative to any litigation against
2 the company?
3 A No.
4 Q What sorts of things did you attend to in
5 that three or four year period?
6 A We just tried to, you know, keep things
7 running while we replaced management. It was strictly
8 an interim thing. It was announced as an interim thing.
9 It was strictly a temporary thing for about three or
10 four or five months.
11 Q And if we just broadly look at the period
12 1986 to 1992, up to the time you spent three or four
13 months running Liggett, would it be true that Liggett
14 was to you a company in which you had a controlling
15 interest?
16 A Yes.
17 Q And a company that only reported really to
18 you through its management?
19 A That's correct.
20 Q And only reported to you in sort of a bottom
21 line sense, Are we making money, Are we losing money?
22 A That's all we saw. We got a monthly report
23 on financials, and that was it. By the way, now the
24 time is getting better. I think it was now '93 when we
25 ran it, during the early part of '93 was the time.
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1 Q After this short stint running the company,
2 did you ever run it hands-on again up to today?
3 A No. Again, I didn't run it hands-on during
4 that period of time. I was just there for a day every
5 two weeks just to make sure things were -- you know, in
6 theory we had the title, but we were never there full
7 time to operate the company.
8 Q Because you still had vice presidents
9 running.
10 A Right. They were running for a period, but
11 we had an official title being coexecutive officers,
12 chief executive officers.
13 Q Who shared that with you?
14 A Two other gentlemen.
15 Q Their names are?
16 A Richard Wrestler and Ruben Chakalian,
17 C-h-a-k-a-l-i-a-n.
18 Q After that period of time in '93 up to the
19 present your focus about Liggett unrelated to the
20 cigarette litigation in the last two years or so has
21 been on whether the company made money or lost money?
22 A No. I had other companies to watch and worry
23 about. Brook was just a holding company. Brook held
24 Liggett, held MAI, Western Union. Bunch of other
25 companies that we owned stock in and we managed.
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1 Q You just mentioned Western Union. When was
2 Western Union a part of Brook Group?
3 A It was purchased in '87. The end of '87.
4 Q And how long did you hold it?
5 A We sold it -- it was sold in late '95.
6 Excuse me. Late '94, early '95.
7 Q So at the time Liggett was a part of Brook
8 Group, so was Western Union and so was MAI?
9 A That's correct.
10 Q Any other firms that you can think?
11 A Couple of other smaller ones. They were the
12 main holding group.
13 Q When was it, Mr. LeBow, that you first
14 thought about or considered cigarette litigation or
15 tobacco litigation that involved Liggett?
16 A I had known about it obviously since day one,
17 since the beginning, but never paid much attention to
18 it. In 1988 the Trubalone trial came and went, which
19 Liggett was a defendant, but I never paid much attention
20 to it at all.
21 Q You knew at the time you acquired the company
22 that Liggett was a party to cigarette cases?
23 A Yeah, there were 20-some-odd cases at the
24 time I think. Just approximately.
25 Q And how did you assess that situation?
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1 Meaning what did you think Liggett's potential liability
2 would be?
3 A I was told by all the attorneys involved, I
4 mean Liggett inside attorneys and the outside attorneys,
5 that there was no issue; that the company has never paid
6 a penny in 40 years, and there was nothing involved in
7 this. So I didn't focus on it at all.
8 Q They assured you that the track record had
9 been good?
10 A Right.
11 Q And everyone figured the track record would
12 continue out into the future?
13 A I really didn't focus on it at all. I mean,
14 I just -- you know, there was no liabilities around, and
15 a few lawsuits here and there didn't mean anything.
16 Q When you first acquired Liggett, did you
17 personally give any thought to whether the products that
18 the company was selling caused any harm?
19 A Well, I saw warning labels and knew about
20 that, so obviously I was aware of that.
21 Q Did you think at that time in 1986 that
22 nicotine in cigarettes was addictive?
23 A I never focused or thought about it at all.
24 Q And did you think at all in 1986 about
25 whether or not advertising or marketing activities were
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1 directed at young people?
2 A I didn't think about it much because Liggett
3 did very little advertising. So, I -- A, I didn't think
4 about it, and, B, we had very little advertising, you
5 know, and still do to this day. We were just not

6 focused on the advertising at all.
7 Q From and after the time that you acquired
8 Liggett in '86, did you become involved in any industry
9 activities, you yourself?
10 A No.
11 Q Ever?
12 A Ever.
13 Q Up to today?
14 A Up till today.
15 Q So you have never represented Liggett at any
16 tobacco industry meetings or functions or conventions
17 or --
18 A I think there was one function from UJ, you
19 know, honorary thing, dinner I went to once maybe six,
20 seven, eight years ago. That was it. I never went to
21 any meetings or anything else.
22 Q Liggett did have representatives for the
23 company that attended, for example, Tobacco Institute
24 meetings?
25 A I believe they did, yeah. The management
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1 did.
2 Q And for some years Liggett was a member of
3 the Council for Tobacco Research?
4 A I guess. I don't know for sure.
5 Q But whoever those people were that
6 represented Liggett, it was never you except for that
7 one charity instance you mentioned?
8 A It was not me, and it was not any of the
9 Brook people ever.
10 Q Let's jump forward in time.
11 A Uh-huh (affirmative).
12 Q Just to bracket this a little, Mr. LeBow. It
13 was in late 1995 that you first focused on what you were
14 being told by your lawyers?
15 A That's correct.
16 Q We will get to those things in a couple of
17 minutes. Let's just talk about that period of time from
18 '86 until '95. During that period of time, '86 to '95,
19 including the three or four months that you had the
20 title at Liggett --
21 A Uh-huh (affirmative).
22 Q -- did you at any time investigate what the
23 company knew about the health effects of smoking?
24 A Only two instances happened during that
25 period of time which focused on. One was I was deposed
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1 by Mr. Rosenblatt down in Florida at a deposition, and I
2 think for the first time I met one of the outside
3 counsels during that deposition.
4 And the other time was I was -- happened to be
5 at Liggett just going over financials in I guess it was
6 '94, when Mr. Horrigan was preparing for his
7 congressional testimony, and we had a little
8 conversation at that point. And towards the end --
9 towards '94/'95, after that, I started asking the inside
10 counsel for some reports because I didn't understand all

11 of these issues, who was suing, what was suing. I
12 started to look at it a little bit deeper and get some
13 reports, ask for some reports in '94/'95 to get a better
14 feel for things.

15 Q The deposition you mentioned was in 1993 in
16 the summer?

17 A Yes, I believe so.

18 Q And it was in the course of preparing for
19 this deposition that you met for the first time one of
20 Liggett's outside lawyers?

21 A Either the first time or second time. I
22 mean, I may have met him briefly -- I probably met him
23 briefly a year or two before.

24 Q And "outside lawyers" just refers to a lawyer
25 that is not directly employed by Liggett?

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1 A Inside, right. He's outside. Works for a
2 law firm outside of the company as opposed to working
3 for the company.

4 Q Which firm was that?

5 A At the time I think it was Webster Sheffield
6 in the firm.

7 Q And did you and this lawyer as you were
8 preparing for your deposition in 1993 talk about what
9 the company knew about the health effects of smoking and
10 whether or not nicotine was addictive?

11 A We talked a little bit about it, yes.

12 Q What was the substance of the conversation?

13 A You know, he said to me, you know, One of the
14 questions you may be asked is whether nicotine is
15 addictive or not. I said, In my case, I didn't think it
16 was that addictive because I stopped smoking 20 or 30
17 years ago. But, you know -- so I will answer it my own
18 personal basis. And as far as -- If he asks questions
19 about the health effects, he advised me to say, you
20 know, no one has ever proven anything, no one knows, and
21 so forth. So I believe I answered, I really don't know.
22 That was the essence of the conversation.

23 Q The other instance you mentioned is in 1994
24 when Mr. Horrigan was preparing to testify before
25 Congressman Waxman's committee, correct?

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1 A Correct.

2 Q And you and he had a conversation at that
3 time?

4 A I didn't know anything about it. I just
5 happened to be there at Liggett, and I saw him preparing
6 all day long with the lawyers for this deposition or
7 hearing or, whatever, and I just inquired what was going
8 on, what's this all about, and he was all nervous and
9 everything, that he had to go to Washington and appear
10 before some committee. And that was the extent of it.

11 Q Did you learn anything in the course of that
12 conversation?

13 A No, I didn't talk any details with him, no.

14 Q And then it was in 1995, I think, that you
15 yourself first focused on the question of smoking and

16 health?
17 A Yeah, I started then asking the attorneys,
18 the one -- the attorneys in-house in Liggett. Joe
19 Murray who was the attorney -- the main attorney for
20 Liggett to start sending me some reports about things.
21 I wanted to start understanding more about the legal
22 aspects because I didn't really understand anything.
23 And he did start sending me, you know, I guess once a
24 month a status report on litigation in '95.
25 Q What sort of information was contained on
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1 these status reports that you got?
2 A What the plaintiffs basically -- the case
3 was, what the issues were. You know, more legal than
4 anything else. What the status of the -- how many
5 lawsuits we had, what the status of each lawsuit was,
6 things of that nature just to get better information
7 what was going on, which I never, you know, asked for
8 before.
9 Q And in the reports that you got from
10 Mr. Murray, he told you, I take it, what the issues
11 were, what the claims were about?
12 A Correct.
13 Q And did you inquire at that time as to what
14 Liggett's answer was or response was to those things?
15 A No. I just, you know, filed the reports in
16 my -- you know, myself, and just wanted to be kept
17 abreast. I did not delve into it in any detail.
18 Q How long had Webster & Sheffield been
19 Liggett's outside counsel?
20 A As far as I -- as long as I know.
21 Q Long time?
22 A Long time. 20 years, 30 years. I have no
23 idea.
24 Q And had that firm done all of Liggett's
25 tobacco-related work?
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1 A Yes, that's all they did do for us.
2 Q And --
3 A Tobacco litigation related work.
4 Q Yes.
5 A Yes.
6 Q Mr. Murray, how long had he been at Liggett?
7 A Many years. 20 years. I don't know exactly
8 how long.
9 Q And in getting information both from the
10 outside counsel, Webster, and from Mr. Murray, did you
11 rely on that information?
12 A Absolutely.
13 Q And did you accept it as true?
14 A Yes.
15 Q What happened, Mr. LeBow, in 1995 that caused
16 you to investigate further?
17 A Well, a few things happened. First of all,
18 Webster & Sheffield, I think a couple of years earlier
19 had dissolved, and the group of other attorneys went to
20 Mudge, Rose. So just the same attorneys, but just at

21 another outside law firm.

22 Then, you know, a couple of strange things
23 happened in '95 which started me to really thinking
24 seriously that maybe I really don't understand what's
25 going on here.

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1 The first thing happened was in September of
2 '95 or so, Mudge, Rose, this law firm was dissolved, had
3 their own problems. The firm was breaking up. And this
4 group of attorneys came to me and said, you know, they
5 would like to go to another law firm, would I agree for
6 them to go to another law firm. I said, Which law firm,
7 and they told me Latham & Watkins, and I said, I don't
8 know. Let me call you back and let you know.

9 And I had known -- I had met Mark Kasowitz
10 from the Kasowitz, Benson, Torres & Friedman firm who
11 were specialists in product liability and I thought it
12 was a good idea now for this group of attorneys, since
13 Mudge, Rose was breaking up, to go to this firm where I
14 knew the people. So I suggested instead of going to
15 Latham & Watkins they go to Kasowitz's firm and take the
16 business there. The reason being, I could get -- you
17 know, I could get -- I had a better relationship with
18 the senior partner there. I didn't know any of the
19 Mudge, Rose senior partners, or any of the Latham,
20 Watkins senior partners for that matter.

21 So they called me back two days later and they
22 told me if I let them go to Latham, Watkins, Philip
23 Morris will pay all of my legal fees, and I couldn't
24 understand why. All of a sudden Philip Morris wants to
25 pay my legal fees?

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1 So, you know, I spent -- you know, not to look
2 a gift horse in the mouth, so to speak, for the time
3 being -- I was very busy on some other things. I said,
4 Fine, go there. Make an agreement with Philip Morris,
5 let them pay the legal fees. But it really started me
6 thinking that something is not right. I couldn't
7 understand why my attorneys were willing to be paid by
8 one of my competitors. That really started me thinking
9 that something is not right here.

10 So I'm sorry. Go ahead.

11 Q No competitor had ever offered to pay your
12 legal fees before?

13 A Pay anything for me before. That's not the
14 way it's supposed to be. I mean, I could foresee a
15 case -- it made no sense to me, because I could foresee
16 an instance where we'd have a conflict. You know,
17 Philip Morris and I didn't always see eye-to-eye on
18 everything, or didn't at that time. Obviously today
19 don't. But that really bothered me. It really started
20 me thinking that something is not right here. There is
21 something here I don't know.

22 Q And the amount of money involved was not
23 small?

24 A No, it was like eight million dollars or so a
25 year, or something in that range.

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1 Q So that to the extent Philip Morris was
2 willing to pick up Liggett's legal fees, it was a
3 significant commitment on their part?

4 A Well, that's relative, I guess. Relative to
5 Philip Morris. Significant to us. And, you know,
6 meaningful to me. And it really -- like I say, it
7 really started me thinking that something is not right
8 here.

9 Q What else happened in '95?

10 A At the time I was involved with a proxy fight
11 with RJR, and -- in which the shareholders were all
12 asking -- not asking but demanding RJR break up its
13 business between tobacco and food, Nabisco, and RJR was
14 publicly and privately saying they can't do it because
15 of all of the litigation -- tobacco litigation. And I
16 couldn't understand that.

17 I said, What tobacco litigation. I have been
18 told for years there is no tobacco litigation. There
19 are no issues. There is a few lawsuits around that, you
20 know, some crazy lawyers are trying to do, and it made
21 no sense. So between that and Philip Morris paying my
22 legal fees, I figured these guys are lying. These guys
23 are not telling the truth. Something is not right. And
24 that's when I decided that this doesn't make sense, and
25 these guys are just not telling me the truth. I am not

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1 hearing the truth from these people, because these two
2 events did not add up to me.

3 Q Didn't make any sense?

4 A It made no sense to me whatsoever. None
5 whatsoever. And that's what started me -- then I
6 started conferring with the Kasowitz firm, the lawyers I
7 wanted these people to go to, and I said, I want to
8 study this now. I want to see what's going on.

9 Q What instruction and direction did you give
10 the Kasowitz firm when you first had them look into
11 this?

12 A Well, when I first started looking into it,
13 understand that I now did not really trust my own
14 lawyers. When these two things happened, especially
15 them accepting or recommending -- worse yet,
16 recommending that I accept Philip Morris' legal fees, I
17 now -- I now felt very uncomfortable. That -- so we had
18 nothing to look at. We had no documents or anything to
19 review. We had very limited stuff. So I figured the
20 best way to really find out -- really find out what's
21 going on is say, Look, let's talk to the other side. I
22 mean, why can't we sit down and talk to the plaintiffs
23 in this case and try and figure out what's happening.

24 As it turned out, Mr. Kasowitz had a very good
25 relationship with one of the others attorneys. He had

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1 just settled another case not involved in tobacco but

2 involving something else, and they had preliminary
3 meetings with him.

4 Q And that was Mr. Barrett in Mississippi?
5 A That's correct.

6 Q And Mississippi at that time was one of the
7 states that had filed suits against Liggett and others?
8 A That's correct.

9 Q And you instructed or authorized Mr. Kasowitz
10 to have conversations with Mr. Barrett?

11 A Yeah. Mr. Kasowitz and Mr. Benson here also.

12 Q Mr. Benson is here today with us?
13 A That's right.

14 Q And was that about settlement at that point?
15 A No. Well, it was first initially it was
16 about, you know, trying to understand what was
17 happening, what this was all about, because, you know,
18 you can't understand these things until you really talk
19 to people.

20 Q You weren't satisfied when you asked the
21 Kasowitz, Benson firm to become involved that you had
22 been told the truth about what the plaintiffs' cases
23 were about?

24 A That's correct. I was not satisfied.

25 Q And I take it both Mr. Kasowitz and
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1 Mr. Benson and maybe others then had conversations with
2 Mr. Barrett and maybe others?

3 A That's correct.

4 Q And what did they tell you?
5 A They came back and told me that there is some
6 serious issues here and with these lawsuits, and I
7 started to find out more about the issue of nicotine
8 being addictive and people not being warned about it.
9 You know, this was one of the main issues that the other
10 side was talking about. And I started to get concerned
11 about it.

12 I said, Maybe there's something here. I don't
13 know. If there's something here, let's sit and talk and
14 maybe, you know, make a settlement, if we could, and try
15 to understand it more.

16 Q Did the Kasowitz, Benson firm at some point
17 look at some of Liggett's documents at your instruction?

18 A Not at this point, no. No, I didn't want the
19 other -- the attorneys -- my own attorneys to know what
20 I was doing.

21 Q All right. So as of this point in time when
22 you first instructed the lawyers, Mr. Kasowitz and
23 Mr. Benson, to talk to the plaintiffs' lawyers, you
24 hadn't looked at any documents through them?

25 A No. They hadn't look at any documents, and
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1 neither had I.

2 Q And the reports you got back about the
3 conversations with the plaintiffs' lawyers, how did you
4 react to that?

5 A I thought it was time to sit down and talk.
6 I wanted to learn more about it. I got very curious.

7 Things didn't make any sense. Again, you had these two
8 events happening. I couldn't look at the documents
9 because if I looked at documents, people would suspect,
10 what am I doing, why all of a sudden I want to see
11 documents.

12 Q Hadn't looked at them for nine years?

13 A Never. Never looked at them ever. But I had
14 an intuitive feeling that this isn't right, that
15 something here doesn't add up. Why are these two major
16 companies, one paying my legal fees and the other one
17 saying they can't do things legally. You know, why are
18 they so concerned that they're telling me through my
19 lawyers, not directly, but through my lawyers that there
20 is no issue here. We win every lawsuit and we are going
21 to beat everything. There's nothing to worry about. A
22 few lawsuits and no big deal. And I didn't believe
23 them.

24 Q You didn't believe them anymore?

25 A Anymore.

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1 Q Had you believed them up to that time?

2 A I didn't focus, but -- you know, I believed
3 them because I had no reason not to believe them.

4 Q Mr. LeBow, before we continue with the
5 meetings that you had with lawyers from Kasowitz, Benson
6 and the plaintiffs' lawyers, I want to step back for a
7 moment, if we may, and ask you -- sorry. Start over.

8 Ask you whether at the time that you first
9 acquired Liggett you understood that Liggett cooperated
10 in terms of positions it took with other tobacco
11 companies that were also involved in cigarette or
12 tobacco litigation.

13 A I knew that during this period of time, '88
14 to '86, till then, till about '94, '95, that Liggett and
15 all the other tobacco companies acted together, and they
16 were joint defendants in a lot of lawsuits. And Liggett
17 being the smallest one, having only 2 percent, 3 percent
18 of the market share, we just kind of just went along
19 with everybody else.

20 Q From what you understood about that approach
21 to the defense of tobacco cases, were there leaders in
22 the group?

23 A Yes. The major tobacco companies were the
24 leaders.

25 Q And who were they?

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1 A Philip Morris and RJR, and sometimes, you
2 know, depended on the case. Some cases had some
3 companies and some cases did not.

4 Q But in the general sense Liggett went along
5 with the defense of the tobacco cases along with the
6 other companies?

7 A It was my understanding, as I said, we were
8 paying maybe 6 to 8 million dollars a year. The other
9 companies were spending hundreds of millions of dollars
10 a year for the same cases. So we were pretty much
11 piggybacking on what they were doing. They were leading

12 the defenses, spending hundreds of millions, and us
13 spending 7, 8, 9 million, whatever it might be.

14 Q Before the break we were talking about the
15 conversations that your new counsel, the Kasowitz,
16 Benson firm, was having with the attorneys representing
17 some plaintiffs, and this was in 1995 or early '96; is
18 that true?

19 A That's correct.

20 Q And at that time other than the personal
21 injury cases that were pending against Liggett, how many
22 cases were pending at that time that had been brought by
23 states or entities?

24 A I think there were six or seven, and there
25 was this large class action called the Castano class
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1 action.

2 Q And that was a case pending in Louisiana?

3 A That's correct.

4 Q And what did you understand that case to be
5 about?

6 A That's the first time I really understood
7 that the case to be about nicotine and addiction; that
8 people were not warned that nicotine is addictive, and
9 they had no problems vis-a-vis nicotine.

10 Q After the first round of conversations
11 between your new lawyers, Mr. Kasowitz and Mr. Benson
12 and their firm, and the plaintiffs' lawyers, did
13 something else occur in terms of getting information?

14 A No, not during this time.

15 Q When was that that you next -- you next had
16 conversations with some of the state Attorneys General
17 or the private lawyers representing the states?

18 A Well, Mr. Kasowitz and Mr. Benson had some
19 conversations with the lawyers and felt that we could --
20 we could strike a deal with the plaintiffs at this point
21 in time. And I authorized them to set up meetings, and
22 we met -- we all -- Let's all meet together face-to-face
23 and try to hammer out a deal and understand each other's
24 positions.

25 Q And did you attend one or more of those
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1 meetings?

2 A Yes.

3 Q And in the course of that, did you learn more
4 about what the issues in these smoking cases were?

5 A Yes.

6 Q What did you learn?

7 A I learned nicotine was a major issue, which I
8 never realized before that the addiction of nicotine was
9 the major issue that everyone was focusing on.

10 Q And this applied to both the state cases and
11 the Castano case?

12 A That's correct.

13 Q And was that the first time that you really
14 saw nicotine as being a major issue in these cases?

15 A Yes.

16 Q And did these plaintiffs' attorneys and the

17 Attorneys General tell you and your lawyers in the
18 course of these meetings that they firmly believed that
19 nicotine produced an addiction?

20 A Yes.

21 Q Nicotine in cigarettes?

22 A Yes.

23 Q What was your reaction to that?

24 A I thought intuitively they are correct. I
25 mean, to me it made sense. You know, I have seen

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1 some -- the only thing, I was a little confused because
2 I have seen people quit. I have seen people, you know,
3 who can't quit. So, again, not being a scientist or an
4 expert in this area, just as a layman, I was somewhat
5 confused at this point in time. I thought they had, you
6 know, interesting aspects to this.

7 Q Did you do anything to try to deal with the
8 confusion you were feeling at that point?

9 A No, at that point I had no resources to do
10 that. I mean, I couldn't even call up and ask my own
11 people at Liggett. Because I would not talk to any of
12 them at that time, because we were doing all of this in
13 secret, these negotiations. Again, my own in-house
14 attorneys I felt weren't necessarily looking out for my
15 own best interest.

16 Q Or the interests of the company?

17 A Or the interests of the company.

18 Q Or the interests of the shareholders?

19 A Or the interest of the shareholders, or the
20 employees, or however you want to do it. It did not
21 make sense to me the things that they were saying.

22 Q And did you at any point in time go to your
23 outside lawyers, the ones who had gone to Latham &
24 Watkins, to ask them what they knew about this topic?

25 A No. I considered them in the same boat as

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1 the in-house lawyers. I considered them all the same.

2 I did not talk to any of them.

3 Q And that's because -- that's because --

4 A That's because of what happened. This thing
5 with Philip Morris paying our legal fees, it bothered me
6 a lot, and, you know, it was recommended to me by my
7 in-house lawyers and obviously outside lawyers, they
8 went to Latham, Watkins and they took the money, and
9 that bothered me.

10 Q At some point in time you struck an agreement
11 with the Castano group?

12 A That's correct.

13 Q And you struck an agreement with a few of the
14 states?

15 A Five of them.

16 Q When was that, Mr. LeBow?

17 A This is March of '96.

18 Q Why did you make that agreement?

19 A Well, couple of reasons. First of all,
20 Liggett being, again, being the smallest of the tobacco
21 companies, we couldn't afford to lose anything. I mean,

22 if we were to lose any one lawsuit, we would be
23 bankrupt. So, from the economic point of view, your
24 know, it was the right thing to do. And I had a very,
25 very wrong feeling about what the other companies were

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1 telling me.

2 I mean, I started hearing, you know, some of
3 the other side which made a lot of sense. I mean, what
4 they were saying to me, the plaintiffs, started to make
5 some sense here. I said, you know, I should settle
6 this. This doesn't make any sense to go to court.
7 Maybe these guys are right. Maybe nicotine, you know --
8 nicotine probably is addictive, but I didn't have any
9 information at that time. But some of these facts, you
10 know, made sense to me.

11 Q Did you make the agreements because you
12 thought it was the right thing to do?

13 A And I thought it was somewhat the right thing
14 to do. But, again, at this point in time I didn't have
15 any facts. I didn't have any documents to look at. I
16 didn't have any of my own inside experts to talk to. I
17 had no one to talk to. I mean, I was just doing it on
18 an intuitive basis myself and just looking at the law at
19 this point in time and economics. The actual facts
20 about litigation, tobacco, and cigarettes I didn't have.

21 Q After the first settlement agreement in 1996,
22 did you continue to learn more about what Liggett knew
23 and when it knew it having to do with health and
24 addiction?

25 A Right after the settlement these lawyers for
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1 Latham, Watkins -- I didn't have to fire them. They
2 came in and fired me. They quit because I went and made
3 the settlement without them.

4 Q Tell us how that happened.

5 A I think we got a letter the next day saying
6 they resigned from the case. Or couple of days later
7 they sent a letter saying resigned, and I basically told
8 them what I told the Kasowitz firm. You took over.
9 And, you know, I'm happy they resigned because I was
10 getting ready to fire them. So they quit. They sent a
11 letter resigning, and we were happy, although there were
12 a couple of cases I think they had to stay on for some
13 technical reasons. I then instructed the Kasowitz firm
14 to get all of the documents away from them. I put the
15 Kasowitz firm in charge of everything.

16 Q What did you tell the Kasowitz firm to do
17 with the documents?

18 A I told them to do whatever they were supposed
19 to do. I wanted to know what's in those documents. I
20 wanted to study them. And some of the documents were
21 under subpoena, and it turned out some of them
22 apparently weren't turned over to various courts, and
23 they immediately turned them over so they got their
24 hands on them. So lots of other things of that nature.
25 So they spent three or four months studying them, and I

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1 never saw them. They studied them, and then we had a
2 meeting and they told me -- you know, gave me some
3 briefings approximately what was in the documents.

4 Q Over what period of time after the Kasowitz
5 firm finished their review of the company documents,
6 over what period of time did they advise you about what
7 they had found?

8 A It was just off and on, various periods of
9 time. I mean, again, you know, it was just obvious what
10 they had found not to be -- that things were not right,
11 and it was absurd to keep going on saying smoking is not
12 addictive. It was absurd to keep saying smoking doesn't
13 cause any problems, and people were still getting up
14 saying that. So since I heard all of this, I said, This
15 is ridiculous. We have got to settle these lawsuits,
16 and let's do the right thing now.

17 Q When you got this advice from the Kasowitz,
18 Benson firm about what they had found in the documents,
19 what did you instruct them to do?

20 A To immediately call -- like I said, Don
21 Barrett and to Mike Moore, one of the attorneys general,
22 and said, Let's talk about a global settlement here and
23 see if they can negotiate something and make some sense
24 and do the right thing. And we started negotiations.
25 This is now September/October time period of '96.

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1 Q When you say "do the right thing," what do
2 you mean?

3 A I mean settle and disclose everything.

4 Q Because?

5 A Because it's absurd. The industry's position
6 for 40 years to me was totally absurd. It just
7 confirmed what I suspected. I now had confirmation of
8 what I suspected six months earlier, and I wanted to
9 complete the process.

10 Q And you suspected six months earlier that
11 these things had been known all along?

12 A Yes.

13 Q By all of the companies?

14 A Yes.

15 Q And that they hadn't disclosed it?

16 A That's correct.

17 Q And you were going to set about to disclose
18 it?

19 A That's correct.

20 Q Would you describe yourself as a man of
21 conscience?

22 A I would hope so.

23 Q And it was in that spirit that you made the
24 decision to enter into talks with the other side in
25 these cases?

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1 A Let me just be frank. I think it's that
2 spirit and also the spirit of, you know, of being an

3 economic -- being an economic person and trying to
4 protect my company, which I have to do too. So, those
5 two issues together, you know, made sense. I mean,
6 knowing now from the Kasowitz firm what's in these
7 documents, I mean, how could you go forward any other
8 way?

9 I couldn't understand how anyone could. I
10 mean, to this day I don't understand how these people
11 are still standing up and saying smoking is not
12 addictive, smoking doesn't cause problems, and they are
13 doing it as we sit here and talk about it. I'm just
14 reading about it in various trials and things right now
15 saying the same thing. To me it's still absurd.

16 Q One of your motives was to save Liggett, if
17 you could?

18 A That's correct.

19 Q And that's because the cases that were filed
20 against Liggett posed a real threat?

21 A As I said, Liggett could not afford to lose
22 any one case. Making it even worse, Liggett could not
23 even post a bond to appeal a case. If we lose it, we
24 couldn't go to appeals court. The other tobacco
25 companies would write a check and post a bond and appeal

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2403

1 to the Supreme Court. We couldn't even afford to do
2 that.

3 Q So once you gave the instructions to the
4 Kasowitz firm to talk further, what happened next?

5 A We did have some meetings with the Attorneys
6 General and, you know, and the various plaintiff
7 attorneys. A series of meetings in October, November,
8 December, back and forth trying to negotiate this thing,
9 and we had new agreements starting to come together.

10 Q And a further agreement was made in March of
11 1997; isn't that true?

12 A That's correct.

13 Q And that agreement provided in part for
14 financial terms, payments by Liggett?

15 A That's correct.

16 Q And it provided certain nonfinancial terms?

17 A That's correct.

18 Q The financial terms were necessary for
19 Liggett to survive?

20 A That's correct.

21 Q One of the agreements that you made was to
22 issue a public statement?

23 A That's correct.

24 Q And in that public statement you personally
25 said smoking is addictive?

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1 A That's correct.

2 Q And the industry knew it?

3 A Correct.

4 Q You said smoking causes health problems?

5 A Yes.

6 Q And the industry knew it?

7 A Yes.

8 Q As you look back, Mr. LeBow, on the
9 disclosures you made and what the public stance of the
10 industry has been about smoking and health and
11 addiction, do you have an understanding as to why the
12 industry took the positions for 40 years that it has?

13 A Yes. It's pretty obvious why.

14 Q Why?

15 A Well, they had these documents totally
16 contrary. If these things ever came out, it would be
17 devastating to them. I mean, they just haven't told the
18 truth for the past 30, 40 years, and hiding their
19 documents through their lawyers pretty much. The
20 lawyers, they've been hiding them under the guise of
21 attorney-client privilege, a lot of these devastating
22 documents.

23 Q On the question of nicotine being addictive,
24 did you get an understanding that one of the industry
25 positions was that smoking is a matter of free will and

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1 free choice?

2 A I heard that millions of times, yes.

3 Q And did you understand that if nicotine was
4 found to be addictive, that would contradict smoking as
5 being a matter of free choice?

6 A That's correct.

7 Q Or that if nicotine was addictive, smoking
8 was not a matter of free will any more?

9 A That's correct.

10 Q And if nicotine was addictive, maybe the
11 personal responsibility of the smoker would be somewhat
12 in doubt because he is addicted?

13 A That's correct.

14 Q On the question of smoking and health, or
15 whether or not cigarettes cause disease, had you heard
16 that the official position or stance of the industry was
17 that there was doubt or a controversy about whether
18 cigarettes cause disease?

19 A I heard. I never believed it for one minute.

20 Q Did you make the admissions that you did
21 because it was time to stop the denials?

22 A Yes. Absolutely.

23 Q Mr. LeBow, with respect to the testimony that
24 you have given in this matter both yesterday and today,
25 will you agree that that testimony can be made public?

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2406

1 A Yes, absolutely.

2 Q All right. You have no objection to letting
3 the public know what's been said here over the course of
4 the last two days?

5 A I have no objection.

6 Q Of any kind?

7 A Of any kind.

8 Q Thank you, sir. That's all I have.

9 MS. HARTLEY: Your Honor, this would be a
10 good time to break.

11 THE COURT: Approach the side bar and turn
12 the lights on. We don't need the reporter.

13 (Side bar, court and counsel.
14 THE COURT: All right. Ladies and gentlemen,
15 we are going to take the lunch recess at this point. I
16 am going to ask that you be back in the jury room at
17 1:15 because it was a little over an hour. So, please,
18 do not discuss the case among yourselves or with anyone
19 else. We'll try to start right at 1:15.
20 THE BAILIFF: Court recessed until 1:15.
21 (The jury exits courtroom; discussion off
22 record and recess)
23 (Change of reporters, 12:10 p.m.)
24
25

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2407

1 IN THE CIRCUIT COURT, FOURTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 DUVAL COUNTY, FLORIDA
4 CASE NO.: 97-03522-CA
5
6 DIVISION: CV-H
7
8 ANGELA B. WIDDICK, as Personal
9 Representative of the Estate of
10 ROLAND E. MADDOX, deceased,
11
12 Plaintiff,
13
14 vs.
15
16 BROWN & WILLIAMSON TOBACCO
17 CORPORATION, a foreign corporation;
18 LIGGETT GROUP, INC., a foreign
19 corporation; and WINN-DIXIE STORES,
20 INC., a Florida corporation,
21
22 Defendants.

16 AFTERNOON SESSION
17 MAY 21, 1998
18 VOLUME IX
19
20
21
22

23
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2408

1 (Proceedings held in chambers)

2 MR. NYHAN: The portion of the LeBow tape
3 that was played over our objection referred to
4 settlement by Liggett of litigation. And in light
5 of the record that Your Honor has already made with
6 respect to jurors in this case having overheard talk
7 of Liggett having settled this case and having been
8 dismissed from this case when they were in the hall
9 outside, I believe, it was after Mr. Howell and the
10 lawyer from the Kasowitz firm had been introduced to
11 the jury.

12 Later that day, on Monday, the 11th, one
13 of the jurors in the second panel reported that
14 while all the jurors were in the hall about 1:30 in
15 the afternoon, they overheard an ABC news reporter
16 on a cell telephone reporting that Liggett had
17 settled this case and had been dismissed from this
18 case.

19 That coupled with the fact that Your Honor
20 allowed plaintiffs to play a portion of the LeBow
21 testimony to which we objected concerning his
22 settlement of cases, it wasn't clear exactly which
23 ones they were, we move for a mistrial; and also on
24 the ground of Florida Statute 768.041 prohibits a

25 party from introducing evidence of a settlement

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1 before a case pending in trial.

2 THE COURT: Let me make sure the record is
3 clear about something. I don't remember that that
4 was one of the areas we talked about on the LeBow
5 deposition. Now, maybe it's just my faulty memory,
6 but I don't remember specifically --

7 MR. NYHAN: We objected --

8 THE COURT: -- reading the part about the
9 settlement when we were going over the specific
10 objections. Now, I know you have an overall
11 objection to Mr. LeBow's testimony, period, but I
12 thought that that part was an agreed upon portion of
13 the trial. Is that inaccurate?

14 MR. MATTHEWS: Judge, I'm not sure, and I
15 can get Greg down here to ascertain that. But be
16 that as it may, I don't think that that's even
17 controlling because obviously part of the motivation
18 as Mr. LeBow testified about was the settlement of
19 other cases.

20 That deposition was obviously taken long
21 before this trial ever started. It was not even
22 taken in this case. So I don't think the statute
23 that Mr. Nyhan is setting goes to that issue at
24 all. It would have come up on cross-examination
25 anyway.

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1 So I think this is just a stab in the
2 dark, Judge, to try to get a mistrial when there is
3 none there. The issue about the other settlement
4 was handled, was taken care of, and I see no basis
5 for this.

6 THE COURT: Well, I guess my concern is
7 that you had -- I did not -- I guess I was given
8 the opportunity to read all of the deposition and to
9 make a decision based on the entire deposition,
10 Mr. Nyhan. I'm trying to be fair to everybody when
11 I'm speaking on the record, but -- and otherwise.

12 But I was under the impression that once I
13 determined that portions of Mr. LeBow's deposition
14 would be read, then there was an attempt to work out
15 which portions. And I went through line by line
16 many of the portions that were supposed to be
17 objectionable to one side or the other.

18 And since I just did that, I believe,
19 yesterday or the day before, I don't remember that
20 portion which I saw on Mr. LeBow's deposition
21 talking about that's why he determined to settle and
22 everything else.

23 I do remember saying to do the right thing
24 and there was a portion of that about do the right
25 thing, you know, try to settle a case. I don't

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1 remember any of the passages about, I talked to one
2 of the Attorney General's of the states in that case
3 and I -- you know, we attempted to work out a
4 settlement and everything else.

5 I don't know how I would have ruled on
6 that. In fact, I think I might have had excluded
7 it, but I was under the impression that that was not
8 offensive to your side, assuming the fact that the
9 overall deposition was objected to, that that was
10 not a particular portion that was going to be
11 objected to in view of the fact I was going to let
12 some of it in.

13 MR. NYHAN: We did object, specifically,
14 to page 77, line 13; page 78 line 10. And part of
15 that material was allowed. In any event, Your
16 Honor, we make the motion and --

17 THE COURT: I think there's already a
18 record of it. We don't need to go back and look
19 over it. I'll deny the motion at this point.

20 MR. NYHAN: Thank you, Your Honor.

21 MR. MATTHEWS: Thank you, Judge. We're
22 ready to queue the next part.

23 MR. NYHAN: Now we have to play the
24 cross-examination addressing that issue of that
25 motion.

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1 THE COURT: You've already gone over it to
2 make sure it comports to what we've agreed to.

3 MR. NYHAN: Yes.

4 MR. MATTHEWS: This one runs about an hour
5 and 46 minutes, Judge, just to let you know.
6 THE COURT: All right. Off the record.
7 (Proceedings in chambers concluded at 1:25
8 p.m.)
9 (Proceedings resumed, jury absent)
10 THE COURT: All right. Are you ready to
11 proceed, Ms. Hartley?
12 MS. HARTLEY: Yes, Your Honor.
13 MR. NYHAN: Yes, Your Honor, we are. Your
14 Honor, if I might, there's a natural break point an
15 hour into this.
16 THE COURT: Let's go ahead and do that.
17 MR. NYHAN: I would recommend when we get
18 to that point, we ask for a five-minute stretch.
19 MR. MATTHEWS: Where is that so I can have
20 an idea?
21 MR. NYHAN: It's page 284.
22 MR. MATTHEWS: Line 1?
23 MR. MATTHEWS: Yeah, it stops at line 2,
24 That's still correct; is that right?
25 THE COURT: Is that a problem,

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1 Mr. Matthews?
2 MR. MATTHEWS: No, Your Honor.
3 THE COURT: Okay. Bring them in please.
4 (Jury enters courtroom)
5 THE COURT: Good afternoon, ladies and

6 gentlemen. Again, I apologize to you for keeping
7 you back there during that time period, but we were
8 working and there was something that we had to do.
9 So, please bear with us.

10 You're ready to proceed, Mr. Nyhan?

11 MR. NYHAN: Yes, Your Honor. At this
12 point, we'd like to play the cross-examination of
13 Mr. LeBow.

14 (Resume playing of videotape)

15 Q And your hope in settling that lawsuit was
16 to buy your peace from these Attorneys General
17 actions to the extent you --

18 MR. NYHAN: No, that's right. I just want
19 to get the volume right.

20 MS. HARTLEY: All right.

21 A It wasn't a hope. That was the
22 arrangement.

23 Q In addition to buying your peace, you also
24 had provisions included in that agreement that gave
25 you the hope of furthering an interest obtaining an

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1 ownership interest in R. J. Reynolds Tobacco Company
2 or some other tobacco company, didn't you?

3 A I don't know how that would work.

4 Q Did you have any provisions in the
5 agreement, Mr. LeBow, with respect to what happened
6 if Liggett and Brook and/or Brook merged with
7 another tobacco company?

8 A Yes.

9 Q What are those provisions?
10 A I think they speak for themselves.
11 Q Do you recall what they were?
12 A Some of them.
13 Q Well, let's turn to the agreement itself.
14 A Okay. Please do.
15 Q I'll be glad to. Let me have this marked
16 as the next exhibit. Let me show you the document,
17 nonetheless, Mr. LeBow, and ask you to look at what
18 is shown here at paragraph 17.
19 Tell me if what is shown there as
20 paragraph 17 is what you recall being, in substance,
21 paragraph 17 and the agreement you signed?
22 A I have no way of knowing if it's in
23 substance, everything. It doesn't look the same, so
24 I just don't know.
25 Q Would you read it, please, sir.

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1 A The whole paragraph 17?
2 Q Yes, please.
3 A That's going to take us about -- a while.
4 All right. Paragraph 17. Future affiliates --
5 affiliate. 17.1.
6 Q You can read it. All I'm asking you to do
7 is read it to yourself?
8 A I'm sorry.
9 Q You're welcome to read it out loud.
10 A No, no, no, I thought you meant read it
11 out loud. Okay. I've read something similar to

12 this in the actual agreement before. I'm somewhat
13 familiar with what's in here.

14 Q Do you agree that the agreement, as
15 signed, had provisions in it that dealt with what
16 happened to future affiliates of Liggett or Brook?

17 SPEAKER: Objection.

18 Q Do you also agree that the agreement had
19 in it provisions that defined an affiliate and
20 future affiliate?

21 A Yes, they're defined.

22 Q Let me turn you to a page that appears to
23 have a definition of future affiliate and ask you to
24 look at that definition.

25 And my question to you as you read it,

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1 does that appear to be the definition of future
2 affiliate as what's included in the agreement?

3 A It appears to be.

4 Q Now, sir, in looking at that definition,
5 it says, does it not, that "future affiliate" means
6 any one entity other than an entity with a market
7 share greater than 30 percent as of the date of this
8 agreement?

9 A That's what it says.

10 SPEAKER: Objection.

11 Q That includes Philip Morris, doesn't it?

12 A Yes.

13 Q Which is a nonsettling tobacco company?

14 A Correct.

15 Q So a future affiliate is a nonsettling

16 tobacco company --

17 A Correct.

18 Q -- which has less than 30 percent of the

19 market share?

20 A That's what it says.

21 Q So it could include, could it not, R. J.

22 Reynolds Tobacco Company as well as RJR Nabisco?

23 A It could, yes.

24 Q In any event, you agreed earlier that --

25 A Wait a minute, say that again, that

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1 question again. It could include what?

2 Q Either R. J. Reynolds Tobacco Company or

3 RJR Nabisco.

4 A Yes, I suppose so.

5 Q Provision 17.4 provides, does it not, that

6 in the event of a merger of companies such as Brook

7 and Liggett and RJR Nabisco, if that occurs one of

8 the -- and one of the settling states, which would

9 include Minnesota, Mississippi, other states --

10 A Right.

11 Q -- one of the concerns that Liggett had

12 was the possibility of posting a bond -- a problem

13 of posting a bond in the event of an adverse

14 verdict.

15 A Correct.

16 Q And it was your understanding that various

17 tobacco companies had that concern?

18 SPEAKER: Objection.

19 A No, I didn't have that understanding. I
20 thought that depends on the size of the bond. They
21 could easily post a bond.

22 Q Are you saying to this jury hearing this
23 case that there is no advantage to a tobacco company
24 anywhere in obtaining the benefit of not having to
25 post a bond if they get hit for several hundred --

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1 for several billion dollars in a case?

2 A No, I obviously I can't say that.

3 Q In fact, the provision was put in here as
4 to give such a company an incentive to merge with
5 Liggett and Brook?

6 A If they so desired, yes.

7 Q Now, to that extent, the agreement, apart
8 from buying your peace, created an opportunity for a
9 merger with another company; isn't that correct?

10 A Only if they they were guilty. Because if
11 they didn't lose a case, it was worthless.

12 Q Mr. LeBow, if a company was hit for a
13 substantial judgment in a trial court and wished to
14 pursue its appellate rights, in order to avoid
15 posting a bond, there was an incentive for that
16 company to merge with your company, wasn't there?

17 A Yes. But I don't think it's that much of
18 an incentive in this case.

19 Q Did the Attorneys General insist on that
20 provision going in the agreement or did you insist
21 on it?

22 A I insisted on it.

23 Q Throughout the afternoon, you have
24 referred repeatedly to information you obtained from
25 the Kasowitz law firm; is that right?

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1 A That's correct.

2 Q What documents have you reviewed in this
3 process?

4 A I merely reviewed those released by the
5 state of Florida -- by the courts in Florida, I
6 should say, not the state of Florida but the courts
7 in Florida.

8 Q How many documents was that?

9 A I believe eight.

10 Q So the record is clear, those are all the
11 documents you have reviewed with respect to tobacco
12 company liability issues?

13 A Personally reviewed, yes.

14 Q Everything else that you testified about
15 and the information provided to you was information
16 that someone orally articulated to you?

17 A Yes.

18 Q And it's from what they told you based on
19 what they told you they had seen in documents
20 prepared by others?

21 A Prepared by others meaning what?

22 Q Not themselves?

23 SPEAKER: Objection.

24 A Oh, yes.

25 Q Except for the information you obtained

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1 from them and the eight documents you reviewed from
2 Florida, your knowledge about such issues as whether
3 cigarettes caused disease, whether cigarettes are
4 addictive, and whether the tobacco companies have
5 misled the public is the same now as it was in 1994?

6 A Well, it's also all the popular, you know,
7 documents that have been out in the public areas.
8 There's a lot of documents that have been released
9 publicly -- Brown & Williamson documents and many of
10 those documents which have -- there have been many,
11 many stories and articles about et cetera, et
12 cetera. So there's a combination of all those
13 things. It's not just one lawyer telling me one
14 thing.

15 Q So you've got what the lawyers told you
16 and what you've read in the popular press?

17 A That's correct. And what I personally
18 believe.

19 Q And what you personally believe is based
20 on what you believed in 1993 and '94, plus what the
21 lawyers told you and what you read in the popular
22 press?

23 A Correct.

24 Q Now, when you said these documents that
25 have come out from other companies -- and when you

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1 refer to documents that have come out from other
2 companies, you were referring in your instance to
3 what you saw in the way of summaries and newspaper
4 articles and magazine articles about those
5 documents, correct?

6 A A couple of them, I may have -- on the
7 Internet, read a couple of them. But mostly
8 summaries. I agree with that.

9 Q Do you remember which two you read on the
10 Internet?

11 A No, I don't remember.

12 Q What percentage of your assets, your
13 personal assets are tied up in Brook Group?

14 A 75 percent.

15 Q And the other 25 percent is tied up in
16 what?

17 A Various digresses. I don't think I should
18 have to -- I don't know what the relevance of this
19 is.

20 Q Does it have anything to do with the
21 tobacco industry at all?

22 A No, none whatsoever.

23 Q What percentage of Brook Group's income is
24 from the -- is from Liggett?

25 A Brook Group is losing money.

- 1 Q Is Liggett also losing money?
- 2 A At the present time, yes.
- 3 Q In fact, does Liggett have a negative book
- 4 value at present?
- 5 A Yes.
- 6 Q Is the negative book value approximately
- 7 \$150 million?
- 8 A It could be higher. I'm not sure, but it
- 9 could be around there.
- 10 Q When you acquired Liggett -- by "you," I
- 11 mean Brook Group acquired Liggett -- what percentage
- 12 of the cigarette market did Liggett have?
- 13 A I think around 3-1/2 percent.
- 14 Q When you last checked, what percentage of
- 15 the cigarette market did Liggett have?
- 16 A Last year, it was close to 2 percent.
- 17 Q Do you have certain long-term obligations
- 18 coming due to Brook Group and to Liggett?
- 19 A To Liggett, we do.
- 20 Q What are those?
- 21 A There are some bonds coming due; some in
- 22 January and some a year from January.
- 23 Q Is Liggett presently able to pay what it
- 24 owes on those bonds?
- 25 A No.

1 Q Have you undertaken efforts to obtain any
2 delay or relief from those bonds?

3 A We've had negotiations, but they have not
4 been successful yet.

5 Q Why did you originally acquire Liggett?

6 A It was a financial transaction at the
7 time.

8 Q And did you acquire Liggett or -- that is
9 you, Brook Group, acquired Liggett essentially
10 through junk bonds?

11 A Short-term, high-yield bonds, yes.

12 Q Is that what some people would refer to as
13 "junk bonds"?

14 A No, short-term bonds. They were somewhat
15 different, not really what people would call junk
16 bonds.

17 Q The transaction with Liggett occurred in
18 1996 -- 1986; is that right?

19 A Correct.

20 Q And from 1986 until 1995, you essentially
21 had control of Liggett, didn't you?

22 A Through Brook, yes.

23 Q As CEO of Brook, you, nonetheless, had
24 access to whatever information you requested
25 concerning the operations of Liggett, didn't you?

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1 A Yes, as any director would also, as any
2 director has access to any information he wants.

3 Q As a director and as a majority
4 shareholder of Brook which owned Liggett, you were
5 aware of controversies concerning smoking and
6 health, weren't you?

7 A I was aware of various litigation going
8 on, yes.

9 Q And you were aware of public health
10 controversies concerning smoking and health, weren't
11 you?

12 A Yes.

13 Q You had access to whatever information
14 Liggett possessed during that time period as to
15 whether cigarettes caused disease, didn't you?

16 A I, at all times, had access to everything,
17 all of it.

18 Q Did Liggett have scientists?

19 A Years ago.

20 Q Does Liggett have scientists now?

21 A They have a research group. When you say
22 "scientists," scientists in what areas?

23 Q What do you mean by research people?

24 A These are people that pretty much just do
25 the formulations of tobacco, various, you know,

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1 cigarettes. That's all we do right now.

2 Q Did you know Mr. Dietz who testified
3 earlier here today?

4 A I don't know him, no. I may have met him

5 once. I wouldn't know him if I saw him.

6 Q You did indicate, didn't you, that you've
7 taken more of an interest in the health issues that
8 Liggett faces since 1995?

9 A In the past couple of years, yes.

10 Q And you are aware, are you not, that
11 Liggett was required to produce today an individual
12 who was most knowledgeable in the company about
13 certain scientific issues?

14 A I just found that out a few minutes ago.
15 I didn't know that before, you know, half an hour
16 ago.

17 Q And until half an hour ago, you did not
18 know that that individual existed in the company and
19 was named Dietz, did you?

20 A What's the question again? What type of
21 individual? I know we had research people, if
22 that's what you mean. Whether his name is Dietz,
23 there are a bunch of research people. Who they are,
24 I don't know.

25 Q Are you telling this jury from the time

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1 period of 1986 all the way up to a half hour ago, as
2 CEO of Brook, as a majority shareholder of Brook
3 which owned Liggett, and as a director of Liggett,
4 that you did not know whether the company had
5 scientists -- whether you called them researchers or
6 not -- that knew something about smoking and health?

7 A That's correct.

8 Q Does it surprise you, given your roles
9 with Liggett, that an individual was designated and
10 appeared here today who described himself as the
11 manager of scientific issues and said he had held
12 that position since 1990?

13 A I have nothing to say. I have no idea who
14 he is. I've never met him. I know we have a
15 research department that does research into the
16 issues of tobacco -- not health issues, per se.

17 We have no scientists to my knowledge that
18 do any research into smoking and health issues
19 together.

20 Q Can you name any of the scientists that
21 have served in management roles at Liggett since you
22 have been involved in the company?

23 A I can't name since I've been involved or
24 before I was involved. No, I cannot.

25 Q Can you recall ever having a conversation

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1 with any scientist in the company?

2 A I had conversations the past few months
3 about disclosing ingredients to the state of
4 Massachusetts. That, I've had. That's basically
5 it.

6 And some issues about tobacco, talking
7 about, you know, the issues of tobacco, getting just
8 involved in the formulations of various cigarettes.
9 Other than that, no.

10 Q You told us earlier that you came to
11 distrust your in-house legal counsel and your
12 long-time outside legal counsel, that is,
13 Liggett's.

14 Did you ever consider going and talking to
15 any of the scientists in the company?

16 A No.

17 Q Did you consider ever going to the
18 presidents of the company and asking them for
19 information about smoking issues?

20 A The previous presidents?

21 Q Yes, any of them from 1986 until now.

22 A Absolutely not.

23 Q Did you ever consider going to any of them
24 and asking them to instruct the appropriate
25 scientists or other persons within the company to

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1 meet with you concerning issues of smoking and
2 health?

3 A No, I did not.

4 Q Did you ever inquire of anyone within the
5 company as to whether any safer products could be
6 made?

7 A A few months ago, I talked to the current
8 president about this issue, about something Liggett
9 did ten years ago.

10 Q That was Mr. Fulford?

11 A Correct.

12 Q Other than that one conversation, did you

13 ever talk with a president of the company or any
14 officer of the company about whether safer products
15 were available?

16 A We may have had conversations, you know,
17 years ago. I don't recall. It's possible.

18 Q When you say it's possible, are you saying
19 you recall some or you don't recall some?

20 A Again, I remember something about this
21 palladium thing years ago, just having a brief
22 conversation.

23 Q The palladium issue was before your time,
24 wasn't it?

25 A I think so, yes.

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1 Q Did you ever talk with any officer,
2 director or scientist in the company about whether
3 any safer products were available during the time
4 period that you were involved with Liggett in '86 to
5 '97?

6 A No.

7 Q Did you ever talk with any officer, any
8 director or any scientist at the company with
9 respect to whether cigarettes are addictive?

10 A No.

11 Q Would you agree that scientists within the
12 company that deal with smoke chemistry and other
13 issues relating to smoke, would know more about
14 smoking and health and addiction issues than you?

15 A Not necessarily.
16 Q Are you a scientist?
17 A No.
18 Q Apart from your work in engineering -- I
19 believe you said electrical engineering --
20 A Uh-huh (affirmative).
21 Q -- do you have any other science training?
22 A No.
23 Q Do you consider yourself to be an expert
24 in chemistry?
25 A No.

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1 Q Do you consider yourself to be an expert
2 in epidemiology?
3 A No.
4 Q Did you consider yourself to be an expert
5 in toxicology?
6 A No.
7 Q Did you tell us recently in a
8 deposition -- in a deposition that you didn't even
9 know what toxicology was?
10 A I may have.
11 Q Is that correct?
12 A Roughly, yes.
13 Q Is one reason that you didn't over all
14 those years inquire of anyone within the company
15 that you believed that the officers and the
16 directors and the scientists where doing their best
17 with respect to the operations of the company?

18 A Respect to which -- all these, every
19 officer and director?

20 Q Yes.

21 A No, some I fired, and some I got rid of
22 years ago.

23 Q Except for the ones you fired, did you
24 have a basic belief that all of the employees of
25 Liggett were trying -- were people of integrity

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1 trying to do the best they could in their jobs?

2 A From what they were telling me, from the
3 information I had, obviously, yes. Otherwise, they
4 would not have stayed.

5 Q Did you fire anyone because of smoking and
6 health issues?

7 A No.

8 Q Did you fire anyone because of addiction
9 issues?

10 A No.

11 Q Did you fire anyone over a concern about
12 whether they were working hard enough to develop a
13 safer product?

14 A No.

15 Q Did you fire anyone as a result of any
16 concern you had as to whether Liggett was doing the,
17 quote, responsible thing with respect to public
18 health issues?

19 A I think they fired me; they left.

20 Q You're referring to the lawyers?
21 A Yes.
22 Q Did you fire anyone?
23 A No, not that I recall.
24 Q Lawyers or anyone else over those issues?
25 A No, I said they left.

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1 Q I believe you indicated that the first
2 president of the company -- the first president of
3 the company was K. V. Dey?
4 A That is correct.
5 Q And he was followed by James Turner?
6 A Correct. You said Turner. I never said
7 Turner.
8 Q You changed that in case I did say it
9 wrong. Was Mr. Turner followed by Spencer Volk?
10 A Volk. No. It was Mr. Dey, then
11 Mr. Turner, then Mr. Volk; that order.
12 Q And then Horrigan?
13 A Then we had an interim period where Volk
14 left where it was me and Ressler and Chakalian were,
15 like, copresidents for a few months. And then
16 Mr. Horrigan.
17 Q Then Mr. Chakalian?
18 A Then Mr. Chakalian, right.
19 Q And now Mr. Volk?
20 A No. There was Mr. Cummings in between
21 there for a while.
22 Q Did you have an opinion with respect to

23 whether cigarettes were addictive at that time?

24 A In 1996?

25 Q Yes.

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1 SPEAKER: Objection.

2 A I hadn't thought about it that much.

3 Q Do you know the difference between
4 addiction and dependence?

5 A No.

6 Q Do you know the difference between
7 addiction and habituation?

8 SPEAKER: Objection.

9 A No.

10 Q Do you know the difference between the
11 Surgeon General's definition of addiction in 1964
12 and the definition that emerged in the 1980s?

13 A No, I do not.

14 Q Did you see Mr. Horrigan's testimony
15 before Congress in 1994?

16 A Yes, I did.

17 Q Did you make any attempt to contact the
18 media or Congress at that time and denounce his
19 position?

20 A No, I did not.

21 Q Did you discuss his position with him?

22 A No.

23 Q Mr. LeBow, let's begin with a few more
24 questions about Liggett's financial situation.

25 Let me hand you what has been marked as

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1 LeBow Exhibit No. 1362 and ask you if you can
2 identify that document, please, sir.

3 A It's a Form 10-Q for June 30th, 1997,
4 filed with the FCC.

5 Q Is that the Form 10-Q filed by Liggett?

6 A Yes.

7 Q Could you tell the jury what a 10-Q is?

8 A It's a result of financial condition of
9 the company that we file with the FCC every quarter.

10 Q Who prepares that document?

11 A It's prepared internally by the Liggett
12 people.

13 Q In the normal course of business, do you
14 see the document before it is submitted?

15 A Not in the normal course of business, not
16 normally, no.

17 Q Do you at some point, typically, review
18 the documents?

19 A Sometimes, but not every time.

20 Q Is it important that the information in
21 the documents be accurate?

22 A Yes.

23 Q Why is it important?

24 A Well, that's all we do is report the
25 accurate information.

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1 Q Are there laws that require companies to
2 report that information accurately?

3 A Yes.

4 Q And my question, Mr. LeBow, is whether --
5 there's a section on page 11 entitled Notice to
6 Consolidate a Financial Statement?

7 A Yes, there is a section headlined that.

8 Q What is that section intended to do in the
9 Form 10-Q?

10 A It's to give more information about the
11 financial state.

12 Q Under the note No. 1, would you hand me
13 back the document?

14 Is there a sentence that begins at the
15 bottom of page 11 and continues onto page 12 and,
16 indeed, is part of a paragraph that ends on page 12?

17 A That's pretty obvious. Why do you ask me
18 a question like that? There's a sentence there,
19 sentence there, paragraph there.

20 Q Would you read that paragraph, please,
21 sir, for the record? In other words, read it out
22 loud?

23 A Read it out loud?

24 Q Yes.

25 A "The company consolidated financial

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1 statements have been prepared assuming the company
2 will continue as a growing concern. Liggett had net
3 capital deficiency of 178 million, six-six-six-zero
4 as of June 30th, '97, is highly leveraged, has
5 substantial near term debt service requirements.

6 "Due to the many risk uncertainties
7 associated with the cigarette industry and the
8 impact of the tobacco --

9 REPORTER: I'm sorry. You'll have to slow
10 down?

11 A I'm sorry. "Due to the many risks and
12 uncertainties associated with the cigarette industry
13 and the impact of tobacco litigation, quote --
14 paren, rather, see note eight, end paren. There can
15 be no assurance the company will be able to meet
16 it's future earnings or cash flow calls.

17 "Consequently, the company could be in
18 violation of certain debt covenants, and if it's
19 lenders were to act on their acceleration rights on
20 its revolving credit facility, in paren, the
21 facility, end paren, or the indenture for its senior
22 secured notes, paren, the Liggett notes, end paren,
23 or refuse to lend under the facility, the company
24 would not be able to satisfy such demands or its
25 working capital requirements."

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1 Q And I believe you told us yesterday
2 Mr. LeBow, that you're in the process of trying to
3 renegotiate some of those arrangements?

4 A Correct.

5 Q But have not yet been successful in doing

6 so?

7 A That's correct.

8 Q Is there a sentence that begins at the

9 bottom of that page that tells what happens in the

10 event that you are unsuccessful?

11 A Yes.

12 Q What does that sentence say?

13 A The whole paragraph here?

14 Q What does the paragraph say?

15 A You want me to read it?

16 Q Yes.

17 A "The failure to pay interest on Liggett

18 notes would permit the lenders of the facility to

19 cease making further --

20 REPORTER: I'm sorry. You have to slow

21 down?

22 A I'm sorry. "Would permit the lenders

23 under the Facility, capital F, to cease making

24 further advances. While the lenders have continued

25 to make advances and management currently

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1 anticipates that they will continue to do so, no

2 assurances can be given in this regard.

3 "The company is unable to restructure the

4 terms of Liggett notes, extend the facility or

5 otherwise make all payments thereon within the

6 applicable grace periods, substantial to all its
7 long-term debt, and the facility would be in
8 default, and holders of such debt could accelerate
9 the maturity of such debt.

10 "In such event, the company may be forced
11 to seek protection from creditors under applicable
12 laws."

13 Q Mr. LeBow, when it says you may be
14 forced -- the company may be forced to seek
15 protection from creditors under applicable laws,
16 does that mean file bankruptcy?

17 SPEAKER: Objection.

18 A Possible reorganization.

19 Q Which is under the bankruptcy laws?

20 SPEAKER: Objection.

21 A In filing for reorganization, yes.

22 Q In filing for reorganization, do you do it
23 under the bankruptcy laws?

24 A Yes.

25 SPEAKER: Objection.

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1 Q Now, the next sentence says what?

2 A "These matters raise substantial doubt
3 about the company meeting its liquidity needs and
4 its ability to continue as a going concern."

5 Q So the most recent 10-Q for Liggett
6 indicates, as a conclusion to the notes, that these
7 matters raise substantial doubt about the company
8 meeting its liquidity needs and it's ability to

9 continue as a going concern?

10 A Since our settlement in March 1996, our
11 volume has fallen off significantly for pretty
12 obvious reasons.

13 (Change of reporters, 2:00 p.m.)

14

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1 Q And has the volume continued to fall?

2 A It's stabilizing somewhat, yes.

3 Q But you're still very much in debt?

4 A The debt has not changed. We have been
5 paying our interest on time, though. That was done
6 on time. We are not in default on anything as of
7 right now.

8 Q Let me show you now what we've marked as
9 LeBow Exhibit No. 1359. Let me show you, then,
10 Exhibit -- LeBow Exhibit 1361.

11 Is that exhibit, Mr. LeBow, a deposition
12 of you taken on July 18, 1997?

13 A Yes.

14 Q Would you turn, please, Mr. LeBow, when
15 you get your copy back from counsel to page 109.

16 A Okay.

17 Q Do you recall Mr. Grossman asking you in
18 the deposition, Question, You waive all your
19 privileges? And you answered, Liggett's privileges,
20 yes.

21 A That's what it says.

22 Q Well, did you give that answer, that you
23 recall?

24 A Yes, I'm sure it's an accurate transcript.

25 Q Did he then -- did he then ask, All of

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1 Liggett's privileges, and you answered yes?

2 A Yes.

3 Q And did he then ask, How about Brooks'
4 privileges, and you answered and Brooks?

5 A Yes.

6 Q And then he asked you, did he not, are
7 there any privileged lawyer documents that you have
8 withheld from the Attorneys General, and you
9 answered, Not to my knowledge?

10 A Correct.

11 Q And then he asked, Are there any privileged
12 Liggett documents that you have withheld from other
13 plaintiffs in this litigation, and you answered,

14 Yes. Other plaintiffs? What do you mean other
15 plaintiffs? Is that correct?

16 A That's what it says.

17 Q And as best you can give me, do you have
18 reason to doubt the accuracy of that question?

19 A No, I have no reason to doubt its accuracy.

20 Q Did he then ask, Plaintiffs with whom you
21 haven't settled. And you answered, Yes, we have not
22 waived our privilege, my understanding, for other
23 plaintiffs.

24 Is that correct?

25 A That's correct.

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1 Q And he then asked, to be sure, So you have
2 waived your privilege not as a matter of public
3 health and not for the benefit of the public, but
4 rather for purposes of the settlement; is that
5 correct? And you answered, You know, I really don't
6 know the answer to that. I have to think about
7 that. Is that correct?

8 A Well, for example, I haven't raised --
9 waived my privilege against RJR to you. You're a
10 plaintiff in this case, that's for sure. I haven't
11 waived my privilege to you.

12 Q Was that a correct reading of the question
13 and answer?

14 A Yes, it's a correct reading of what is on
15 the deposition, yes.

16 Q So the record is clear on this, you've told
17 us about the general counsel of Brook talking to some
18 counsel at Liggett. You've told us about
19 conversations you've had with Mr. Murray.

20 Did you ever have between 1985-'86 and
21 1995, when you became suspicious, any conversations
22 with any other inside legal counsel at Liggett?

23 A No, I haven't. Mr. Murray was the only one
24 I ever talked to.

25 Q Apart from the one meeting you had with one

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1 of the outside counsel in connection with the
2 deposition conducted by Mr. Rosenblatt, which I'll
3 come back to in just a moment, apart from that
4 occasion, did you have any meetings or telephone
5 conversations with Mr. Kearney or Mr. Decker or
6 anyone with Webster Sheffield or Mudge, Rose?

7 A I may have met him once, you know, outside
8 of Liggett at their offices. I guess maybe we're
9 talking about the time they were leaving Webster,
10 Sheffield going with Mudge, Rose just on a -- not on
11 any detailed basis.

12 Q Did you discuss smoking and health
13 liability issues?

14 A I don't recall. It's a long time ago we
15 talked about it.

16 Q Did you receive written reports from them?

17 A No.

18 Q Is it fair to say that their dealings were

19 with Liggett?

20 A Correct.

21 Q I believe you said in your earlier
22 examination, correct me if I'm wrong, that there were
23 two times you focused on smoking and health issues
24 before 1995, when you became more concerned.

25 One of those was a -- when you were deposed

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1 by Mr. Rosenblatt and another time was when
2 Mr. Horrigan testified in Congress?

3 A Correct.

4 Q Now, at the time you were deposed by
5 Mr. Rosenblatt, you met one of the outside counsel;
6 is that right?

7 A That's correct.

8 Q Was it just one?

9 A I believe so, yes.

10 Q And do you recall which one it was?

11 A Mr. Kearney, I believe.

12 Q You said that Mr. Kearney talked with you
13 about addiction?

14 A Yes.

15 Q And I believe you said that you told him
16 that you were going to testify based on your personal
17 opinion about addiction at that time?

18 A Personal, yeah, history.

19 Q And, in fact, you testified in
20 Mr. Rosenblatt's deposition about your personal

21 history?

22 A Yes.

23 Q And your personal history was that you had
24 smoked for a number of years and then you had quit?

25 A Correct.

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1 Q And once you had quit, you had never gone
2 back?

3 A That's correct.

4 Q And you also indicated in that deposition
5 that your personal opinion at that time was that
6 cigarette smoking was not addictive?

7 A Based on my own -- upon my personal
8 experience.

9 Q So Mr. Kearney, on that occasion, didn't
10 put words in your mouth as to what to say with
11 respect to addiction. You testified based on your
12 personal basis?

13 A Well, he told me what the industry's
14 position was, that it's never been proven, and so
15 forth and so on. And, you know, I just said what I
16 felt.

17 Q I believe you also said that Mr. Kearney
18 talked to you about what the industry's position was
19 on causation?

20 A Yes.

21 Q And by "causation" we mean whether smoking
22 causes disease?

23 A Correct.

24 Q All right. Now, Mr. Kearney never told you
25 to lie, did he?

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1 A Correct.

2 Q You had a personal view at that time about
3 whether cigarette smoking might cause disease, didn't
4 you?

5 A Correct.

6 Q And it's the same as your personal view
7 now?

8 A Correct.

9 Q But you were comfortable at that time with
10 the idea that apart from your personal belief, based
11 on statistics, that causation had not been proven
12 scientifically, weren't you?

13 A On a highly technical basis, one can come
14 to that conclusion. That's very highly technical.

15 Q Did you not say in the deposition, I don't
16 know whether it causes --

17 A Right. No, I said I don't know the answer
18 to that.

19 MR. BENSON: Objection.

20 Q And you were comfortable with that answer
21 at that time?

22 A Well, Mr. Kearney yelling at me, "It's
23 never been proven, never been proven," and I have my
24 other side telling me all the statistics. It seems
25 to be pretty obvious that it has been proven, again,

1 from a statistical point of view.

2 Now, if you want to get highly scientific
3 and technical, I'm not prepared, I can't -- you know,
4 I'm not a scientist. I can't get highly scientific
5 and technical, so I decided to answer that question
6 as I don't know.

7 Q And apart from the statistical relationship
8 you still don't know, do you?

9 A Again, I'm not a scientist. I'm not going
10 to answer a silly question like that.

11 Q Let me have -- show you this next exhibit,
12 it's LeBow Exhibit No. 1660. It's the deposition of
13 Bennett LeBow on Friday, November 5, 1993.

14 You indicated yesterday and some today your
15 interest in public health; is that right?

16 A Yes.

17 Q In 1993, you weren't interested in public
18 health, were you?

19 A I wasn't focused on it.

20 Q When Mr. Rosenblatt took your deposition,
21 if you would turn to page 43 of that deposition, he
22 asked you, did he not, at line 11, If I ask you, Does
23 smoking cause lung cancer -- and you answered
24 immediately, I don't know.

25 A I don't know how immediate it was. But it

1 says that here.

2 Q Well, it has the lines to indicate that the
3 question wasn't complete. But in any event, he asked
4 you the question, If I asked you, Does smoking cause
5 lung cancer, you answered, I don't know?

6 A Yes.

7 Q And then he asked you, question, Okay, and
8 you really don't care. Didn't he?

9 MR. BENSON: Objection.

10 A That's what it says.

11 Q He went on to say, Because you're selling a
12 legal product; is that right?

13 A Yes.

14 Q And you answered, Correct?

15 A Well, "correct" refers to selling a legal
16 product, not that I don't care.

17 Q You were only answering half of his
18 question?

19 A That's apparently what I did, yes.

20 Q So at that time, it's your testimony -- so
21 it's your testimony today that as of that time you
22 weren't concerned?

23 A Yes.

24 Q Now, Mr. Murray had been general counsel of
25 Liggett for 20 years?

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1 A I don't know exactly how many years.

2 Q Well, do you recall it being for quite a
3 period of time?

4 A Yes, quite a period of time.

5 Q And Webster, Sheffield, later Mudge Rose,
6 the lawyers at least, had been the counsel for
7 Liggett for 30 years?

8 A Many years. I don't know exactly how many.

9 Q And as far as you know, as far as you
10 believed at that time, at least, all the information
11 that Mr. Murray -- that you had requested of
12 Mr. Murray, he had provided?

13 A To the best of my knowledge, at the time,
14 yes.

15 Q And to the best of your knowledge at the
16 time, the outside lawyers, Webster Sheffield, later
17 Mudge Rose, had successfully defended all the cases
18 up until that point?

19 A To the best of my knowledge, yes.

20 Q You never asked for any more information
21 from anyone at the company that you didn't get?

22 A That's correct.

23 Q And no one in management at Liggett or at
24 any level of the company, whether it was management
25 or otherwise, ever came to you and expressed concerns

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1 about the company's position on smoking and health
2 issues?

3 A That's correct.

4 Q Now, against that background, I believe you

5 said there were two reasons for concern that
6 developed in September of '95.

7 A In my mind, yes.

8 Q Number one, you were approached by your
9 outside counsel. I believe you said Mr. Kearney?

10 A No, not directly. I mean, through
11 Mr. Murray.

12 Q Through Mr. Murray?

13 A Through him.

14 Q Okay. About the -- about their joining
15 another firm?

16 A Correct.

17 Q And you understood from Mr. Murray that the
18 reason they were joining another firm is because
19 Mudge, Rose was collapsing?

20 A Correct.

21 Q And this core group of lawyers that had
22 represented Liggett for maybe 30 years successfully
23 needed a new home?

24 A That's correct.

25 Q And you were asked for your consent?

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1 A Correct.

2 Q And Mr. Murray had no problem with that
3 request?

4 A What, asking me for my consent?

5 Q That's right.

6 A No, he had no problem with that.

7 Q And he had no problem with granting
8 consent, if it were left to him, did he?

9 A He probably would have granted consent,
10 absolutely. But it wasn't left to him.

11 Q What they wanted to do was join the firm of
12 Latham & Watkins; is that correct?

13 A That's correct.

14 Q And Latham & Watkins was a very respected
15 national law firm, wasn't it?

16 A I didn't know them that well.

17 Q You had no reason to doubt their abilities
18 or integrity, did you?

19 A At the time, no.

20 Q Did you ask Mr. Murray his opinion about
21 Latham & Watkins?

22 A No.

23 Q Did you ask your general counsel at Brook
24 about that person's opinion concerning Latham &
25 Watkins?

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1 A No.

2 Q Now, I believe you said you had tried to
3 direct them, instead, to the Kasowitz firm?

4 A Correct.

5 Q Because you knew the senior partners of the
6 firm?

7 A Yes.

8 Q And you knew them to be a products
9 liability firm?

10 A That's correct.

11 Q Who were the senior partners you knew?

12 A Mr. Kasowitz and Mr. Friedman, at that

13 time.

14 Q Let me show you --

15 A And they had done a lot of work for me in

16 the past, the Kasowitz firm.

17 Q Let me turn your attention to the

18 deposition Mr. Grossman took. If you'll hand me the

19 depositions, I'll tell you which exhibit number it

20 is. I believe it's Exhibit No. 1359.

21 A Which one?

22 Q 1359.

23 A Okay.

24 Q Turn, please, to page 62, of that

25 deposition.

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1 You were asked in that deposition, were you

2 not, Question, You are currently represented in

3 smoking and health matters by the Kasowitz Benson

4 firm, and you answered, That's correct; is that

5 right?

6 A Yes.

7 Q Then you were asked, Can you identify the

8 lawyers at Kasowitz and Benson with whom you're most

9 familiar? And you answered, Mr. Kasowitz, Mark

10 Kasowitz, and Mr. Dan Benson; is that right?

11 A That's right.

12 Q Then you were asked about Mr. Michael Faye
13 sitting near you, and you added, Michael Faye and
14 Aaron Marks; is that right?

15 A That's right.

16 Q And you were asked, And Ken Striker, and
17 you answered, And who? And the question was, Ken
18 Striker? And you answered, I don't know.

19 A Correct.

20 Q Then Mr. Faye said it was "Striker." The
21 question then was asked, The Kasowitz firm was a
22 long-time counsel for you in matters other than
23 smoking and health?

24 A Correct.

25 Q And you answered, No, didn't you?

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1 A That's correct.

2 Q And the question -- next question was, When
3 did they become your counsel? And you answered when
4 we initiated this first settlement back in '96; is
5 that correct?

6 A That's what it says.

7 Q And then you were asked, were you not, they
8 became your counsel sometime before the settlement,
9 they participated in the negotiations leading to the
10 settlement? And you answered, Yes, obviously; is
11 that right?

12 A Yes.

13 Q And then you were asked, were you not, And,
14 in fact, you've been widely quoted as saying that

15 as of December 7th, 1995, you had agreed to their
16 proposal to negotiate on your behalf; is that
17 correct?

18 And you answered, They came to me -- they
19 came to me and asked me, you know, would I be
20 interested in negotiating with the other -- with the
21 plaintiffs and I said, Yes, in December of '95. That
22 was the first time they were authorized to conduct
23 negotiations. Is that correct?

24 A That's correct.

25 Q And then you were asked, were you not, And

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1 it was their proposal? And you answered, There was
2 no proposal. It was just a proposal to negotiate.
3 Is that the question? And then you were asked, Yes,
4 it was their proposal to negotiate. And you
5 answered, Yes, it was their proposal to negotiate.
6 Is that right?

7 A Uh-huh (affirmative).

8 Q And then you were asked, were you not, Had
9 they represented you or any of your entities prior to
10 that? And you answered, Not that I recall. Is that
11 correct?

12 A Correct. Well, what happened -- excuse
13 me.

14 Q Then you were asked, were you not, how did
15 it come to you to suggest to you that you negotiate
16 with the plaintiff's lawyer? And you answered, One

17 of their recent partners, an individual who had just
18 recently joined their firm had represented me at
19 another firm.

20 Question, And who was that? And you
21 answered, David or Dr. David Friedman or Friedman.
22 Is that correct?

23 A Right.

24 Q The question was, At what firm had he
25 represented you? And the answer was, At Mudge, Rose?

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1 A Correct.

2 Q Question, And he introduced you to
3 Mr. Benson and Mr. Kasowitz and you answered, That's
4 correct?

5 A That's correct.

6 Q The question was, Mr. Benson and
7 Mr. Kasowitz made the proposal. Answer, Mr. Kasowitz
8 did, yes. Mr. Benson was involved, too, yes. Is
9 that correct?

10 A That's correct.

11 Q Now, in the course of these conversations
12 when Mr. Murray approached you about these long-time
13 counsel for Liggett joining Latham & Watkins, you
14 were told that PM was willing to pay, PM meaning
15 Philip Morris, willing to pay the legal fees, is that
16 what you're saying?

17 A Only after I suggested they go to Kasowitz
18 Benson instead, not before that happened.

19 Q And you said you couldn't understand why

20 Philip Morris would pay your legal fees?

21 A Correct, or would want to pay my legal
22 fees.

23 Q Did you ask Mr. Murray that question?

24 A Probably.

25 Q Wasn't it true, Mr. LeBow, that there was

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1 concern about whether Liggett could provide the
2 necessary funds to successfully defend itself in the
3 increasing numbers of cases?

4 A I never heard that concern. From whom?
5 Concern from whom? Amongst us or amongst Philip
6 Morris?

7 Q Amongst yourself and amongst other
8 companies.

9 A I don't know what the other companies were
10 thinking. Yeah, we were getting somewhat concerned
11 about the rising number of cases, yes.

12 Q And you were concerned, were you not, about
13 your ability to continue to fund the legal defense
14 for all these cases?

15 A I wasn't concerned at that time, no. Maybe
16 it would have become a concern later on, but not at
17 that time.

18 Q Weren't there directions being issued
19 either from you or from management at Liggett about
20 trying to curtail the defense and the costs of the
21 defense for Liggett assumed by Liggett's counsel?

22 A Nobody curtailed the defense. But
23 obviously we wanted to cut costs and we did
24 successfully cut costs the year before. I put things
25 on pretty much -- we had an agreement with the Mudge,

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1 Rose people in this case, when it was Mudge, Rose, to
2 a fixed amount of money per month paid out in a
3 period.

4 Q And they were to do the best they could
5 with what that would cover?

6 A That's correct.

7 Q Did you also testify yesterday that for a
8 few years Liggett had been paying eight or \$9 million
9 a year in legal fees and was piggybacking on the
10 efforts of other companies?

11 A Around the \$8 million level, yes.

12 Q And it had become increasingly difficult to
13 fund that eight to \$9 million level given Liggett's
14 financial situation, wasn't it?

15 A Liggett's financial situation before 1995
16 was starting to improve, but we were funding it
17 currently. It was being paid currently. There were
18 no issues.

19 Q Defending smoking and health cases had
20 proven to be very expensive, hadn't it?

21 MR. BENSON: Objection.

22 COURT REPORTER: I'm sorry?

23 Q Defending smoking and health cases,
24 particularly with the Attorneys General cases and the

25 Castano cases, had proven to be very expensive,

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1 hadn't it?

2 A No.

3 Q Particularly with the Attorney General
4 cases and Castano cases had proven to be very
5 expensive, hadn't it?

6 MR. BENSON: Objection.

7 A It had stayed at that same level for quite
8 a few years. It had been at the six million, seven
9 million, \$8 million level for a few years.

10 Q That's because you had kept it at that
11 level, in terms of what you were willing to spend,
12 correct?

13 A Correct.

14 Q Even though the amount of litigation had
15 increased, correct?

16 A Somewhat, yes.

17 Q Now, certainly, Mr. LeBow, you were
18 concerned, as being involved with one tobacco
19 company, about other tobacco companies losing cases
20 and the possible avalanche of lawsuits, weren't you?

21 A Liggett could not afford to lose even one
22 case, so I wasn't concerned about an avalanche. I
23 was concerned about any one case.

24 Q Now, up until that time, you had been
25 virtually not involved in defending smoking and

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1 health litigation; isn't that right?

2 A Personally?

3 Q Yes.

4 A Yes, I was not personally involved.

5 Q And you had never been represented,
6 according to your sworn testimony, by the Kasowitz
7 firm; is that right?

8 MR. BENSON: Objection.

9 A Not in smoking and health, I had not been
10 represented by them. In bankruptcies, yes.

11 Q You had been represented by Mr. Friedman
12 while he was with the Mudge, Rose firm; is that
13 right?

14 A At Mudge, Rose and for a while he was at
15 Kasowitz. And he did some cleanup work, so to speak,
16 for us at Kasowitz.

17 Q Now, are you certain when he left and went
18 to Kasowitz?

19 A I'm not certain. I believe it was, I guess
20 late '94 or early '95. But sometime in late '94,
21 early '95 he went to Kasowitz.

22 Q And he had never worked on smoking and
23 health matters for your companies, had he?

24 A David Friedman?

25 Q Yes.

1 A Not to my knowledge.

2 Q He was not a products liability lawyer, was

3 he?

4 A No, he was a bankruptcy lawyer.

5 Q He had gone with this firm that had never

6 before represented you on anything, correct?

7 A Correct.

8 Q And you had no experience in defending

9 smoking and health cases, correct?

10 A Correct.

11 Q Did your lawyers ever tell you or

12 Mr. Murray ever tell you that Mr. Kearney or

13 Mr. Decker preferred to go to Latham & Watkins?

14 A I never talked to Mr. Kearney directly.

15 Q Did Mr. Murray ever tell you that

16 Mr. Kearney and Mr. Decker wanted to go to Latham

17 & Watkins?

18 A I don't understand what that has to do with

19 anything. I'm the one paying the bills, not them. I

20 don't care where they preferred to go. I want to go

21 where I have a relationship and go to the firm I

22 wanted to go to.

23 Q Wherever they were going to practice law,

24 you were going to control that?

25 A Control what?

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1 Q Where they wanted to practice law?

2 A I wanted them to go someplace where I

3 wanted them to go. If they didn't, I would get other
4 lawyers.

5 Q Now, you expressed some concern about the
6 amount and the nature of the litigation; is that
7 right?

8 A Yes.

9 Q And you talked with the Milbank lawyers and
10 with your -- and some tobacco industry analysts?

11 A And to counsel.

12 Q Did you go back to Joe Murray and ask him
13 about the Castano lawsuit in detail or about the
14 Attorneys General lawsuit in detail to get some more
15 information about what the issues were?

16 A Yes.

17 Q Did he provide you information?

18 A He provided some lengthy memos, yes, at
19 that time.

20 Q Are you willing to provide those memos to
21 us?

22 A I don't have them.

23 Q Do you waive any privilege with respect to
24 those memos?

25 A Yes.

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1 Q And did he tell you in those communications
2 that there -- regardless of the merits of the claims,
3 there were a lot of dollars at issue in the lawsuits?

4 A He probably did, yes.

5 Q Did you ask him for any additional

6 information?

7 A I don't recall.

8 Q Did you ask the lawyers who were defending
9 the case on the frontline, Mr. Kearney, Mr. Decker,
10 and others, for their assessment of the claims?

11 A I told you, I don't -- I didn't talk to
12 them at all.

13 Q Did you ask any lawyers at Milbank to
14 talk with your lawyers at -- wherever they were,
15 Mr. Kearney and Mr. Decker, concerning the claims as
16 part of the overall proxy by you?

17 A No.

18 Q Now, there was certainly no reason that the
19 lawyers of Milbank couldn't have talked with
20 Mr. Kearney and Mr. Decker, was there?

21 A They could have talked to them. I have no
22 idea.

23 Q You hadn't --

24 A They may have talked to them on their own,
25 as far as I know.

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1 Q But you didn't ask them to do that?

2 A Not that I recall.

3 Q And you never asked the Milbank lawyers for
4 their analysis of these issues, did you?

5 A No.

6 Q You could have called Mr. Murray and
7 asked for more information than you previously had

8 requested and gotten. You could have called in
9 Mr. Kearney and Mr. Decker. You could have called in
10 the Milbank lawyers, but you did none of that?

11 A Yes.

12 Q And you could have called management at
13 Liggett and had them investigate, couldn't you?

14 MR. BENSON: Objection.

15 A Yes.

16 Q And you could have gone to talk with the
17 scientists or had some of your lawyers from the Brook
18 Group or from Milbank go talk with the lawyers -- I
19 mean, scientists, talk with the scientists, couldn't
20 you?

21 MR. BENSON: Objection.

22 A Yes.

23 Q I believe we had established that you also
24 hadn't called on Liggett management and you hadn't
25 called on Liggett scientists.

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1 And as far as you know, they could have
2 provided whatever information you wanted?

3 A Their opinions they could have provided.

4 Q And you also could have had the Kasowitz
5 firm simply investigate and get a second opinion
6 directly by looking at documents, talking to Liggett
7 scientists and talking to Mr. Decker and Mr. Kearney,
8 couldn't you?

9 A We already said we didn't have enough money
10 to pay all these legal fees. I wasn't about to waste

11 my money on that.

12 Q So instead of calling in Kearney and
13 Decker, or anyone like that, you said, New lawyers
14 from the Kasowitz firm, go talk to the plaintiff's
15 lawyers and, surprise of surprises, the plaintiff's
16 lawyers said, We have great claims; is that right?

17 A Well, instead of talking to the lawyers who
18 were being paid by Philip Morris -- let's call them
19 that. Instead of talking to the lawyers being paid
20 by Philip Morris, I asked Kasowitz to let's talk to
21 the other side and let's listen to them.

22 Yeah, sure, the other side was saying they
23 got good claims. I want to hear the claims. And we
24 sat down and started listening to their claims and
25 hearing some of the other side. We start -- we sat

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1 down, we started listening to the claims and hearing
2 some of the other side.

3 Q And, of course, they told you they had
4 great claims?

5 A Naturally.

6 Q The Kasowitz lawyers came back to you and
7 said, Plaintiff's lawyers say they have great claims
8 and they're willing to negotiate; is that right?

9 A Correct.

10 Q And you said, Let's negotiate?

11 A Let's meet and talk is what I said. It
12 can't hurt to talk. I saw nothing wrong with

13 talking.

14 Q You and your lawyers went off to negotiate
15 with the plaintiff's lawyers?

16 A Correct.

17 Q And your team consisted of you, who had not
18 been involved in the day-to-day business of Liggett
19 and in the day-to-day handling of smoking and health
20 issues, correct?

21 A Correct.

22 Q And who knew very little about the
23 litigation itself at that point in time?

24 A Correct.

25 Q And the Kasowitz lawyers, who knew what the

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1 plaintiff's lawyers had told them the issues and the
2 claims were?

3 A And had done their own independent research
4 from the public records.

5 Q What was on the Internet?

6 A No, the documents from the courthouses. I
7 don't know if all that was on the Internet.

8 Q They had not looked at any Liggett
9 documents, had they?

10 A To my knowledge, no.

11 Q And they had not talked with any Liggett
12 personnel, had they?

13 A No, I don't believe so.

14 Q You didn't let anyone else in the industry
15 know you were having these conversations, did you?

16 A No, I did not.

17 Q At the time you went to negotiate, a proxy
18 fight was well underway, was it?

19 A The solicitation was well underway, consent
20 solicitation it was called.

21 Q That was the consent solicitation to try to
22 get the RJR Nabisco board to spin off Nabisco?

23 A That's correct.

24 Q Or alternatively to get the shareholders,
25 if the board wouldn't take that action, to elect a

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1 slate of directors that you proposed?

2 A No, that was not part of the consent
3 solicitation.

4 Q That wasn't part of the initial consent
5 solicitation, but that ultimately became the
6 strategy, didn't it?

7 A Yeah, ultimately if they refused to do
8 what the shareholders wanted them to do. If the
9 shareholders requested that they just independently
10 spin off Nabisco and do the right thing, and they
11 kept saying they could not do it.

12 Q And if they did not do it, you wanted the
13 shareholders to elect your slate of directors?

14 A Who were committed to doing it.

15 Q That slate of directors included yourself
16 and Mr. Fulford, who later become CEO of Liggett?

17 A Correct.

18 Q Now, prior to that consent solicitation --

19 A Excuse me, let me correct that. I don't
20 think Mr. Fulford, at this point in time, was on the
21 board or a regular member of the board. No, he was
22 not part of the board solicitation, that's not
23 correct.

24 Q At some point during that consent
25 solicitation process, was Mr. Fulford's name not put

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1 before the RJR and Nabisco shareholders as the person
2 you proposed as the new CEO of RJR Nabisco?

3 A Yes, but not as a director.

4 Q Now, prior to commencing that consent
5 solicitation, you had conducted a number of
6 activities during the year 1995 designed to combine
7 Liggett with another tobacco company, hadn't you?

8 A Which tobacco company?

9 Q Well, without being specific first, had you
10 not during 1995, attempted to discuss various
11 parties' deals whereby Liggett would be combined with
12 another tobacco company?

13 A No.

14 Q Had you not approached RJR Nabisco about
15 combining Liggett and RJR Nabisco?

16 A I approached RJR Nabisco about Liggett,
17 Reemsa, a large German tobacco company, and RJR, the
18 three of us entering into a venture.

19 Q Now, Mr. LeBow, the reason you were doing
20 those things is because being a businessman and being

21 aware of Liggett's worsening financial situation, you
22 believed that you needed to come up with some
23 creative ideas to combine Liggett with some other
24 companies, didn't you?

25 A No, that was not part of the strategy.

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1 I was a major shareholder of RJR. Myself and
2 Mr. Icahan, who is my associate in this venture. We
3 were the second largest shareholder of RJR. And we
4 did all this to make money because we felt there's
5 value, as everyone on Wall Street felt.

6 As today, even today as we sit here today
7 they still believe there's value in splitting up the
8 tobacco and food business. That was the primary
9 rationale for the consent solicitation and the
10 potential proxy change.

11 Q As a part of that spinoff, you had in your
12 mind, did you not, Liggett being combined with
13 Reynolds and/or another company?

14 A No. That was not part or condition of any
15 deal, no.

16 Q But that's what you ultimately had in your
17 mind as your plan, whether you made it a condition or
18 not; is that right?

19 MR. BENSON: Objection.

20 A It's possible. But it would be up to the
21 shareholders of RJR to approve it, which they would
22 only do if it made sense. They wouldn't do it if it

23 was not economical sense to them.

24 Q And to the extent that they approved your
25 board of directors, that increases the chances that

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1 the two companies would combine and the food business
2 would be spun off, did it not?

3 A Well, improved the chances -- the food
4 business being spun off, that was part of the
5 commitment that our board made. There was no
6 commitment whatsoever vis-a-vis Liggett.

7 Q And isn't it true that in late 1995, part
8 of what was driving you was on the one hand a need
9 for this consent solicitation and this proxy battle
10 to proceed successfully, from your standpoint, on one
11 side, and at the same time a need to control the
12 exposure your company had or fear that you had with
13 respect to liability issues?

14 A At that point in time, again, I did not see
15 any documents then. I do not know any of the public
16 health issues at this point in time. I just had
17 suspicions.

18 At that point in time, the need to protect
19 Liggett against a devastating lawsuit or judgment and
20 this issue you're talking about, they were both my
21 motivations, yes.

22 Q And as I believe you said, Liggett could
23 not afford to suffer even a small judgment at that
24 point in time?

25 A Relative to the other companies, that's

1 correct. That's still correct today, as a matter of
2 fact.

3 MR. NYHAN: Your Honor, this would be an
4 appropriate point to take a stretch break.

5 THE COURT: All right. Ladies and
6 gentlemen, I'm going to ask you to step back in the
7 jury room for about five minutes. There's still
8 about another 45 minutes to the deposition. So we
9 thought we would break in between.

10 Please do not discuss the case among yours
11 or with anyone else and just take about a five-minute
12 break.

13 (Jury exits courtroom and recess)

14 THE COURT: Mr. Parrish, Mr. Matthews, may
15 I see you a minute, please.

16 (Change of reporter, 2:35 p.m.)

17

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1 THE COURT: Okay. If you're ready to
2 proceed, Ms. Hartley.

3 MS. HARTLEY: I'm ready, Your Honor.

4 THE COURT: Bring them in, please.

5 (Jury enters the courtroom).

6 THE COURT: Ladies and gentlemen, if you
7 all are uncomfortably hot, we've tried to get them
8 to do something about it, but they can't -- they
9 can't. So if you're comfortable, then you're going
10 to remain so. If you're hot, you're going to remain
11 so.

12 THE COURT: Are you ready to proceed,
13 Mr. Nyhan?

14 MR. NYHAN: Yes, Your Honor. We'll resume
15 the cross-examination of Bennett LeBow.

16 THE COURT: All right. Thank you, sir.

17 Q I'm asking you about your company, Mr.
18 LeBow, and whether you needed in 1995 and early '96,
19 as a businessman trying to protect the interest of
20 your company, whether you needed to reach a deal to
21 settle those cases?

22 A It was a prudent business thing to do,
23 considering that trials were coming up a year
24 and-a-half later. Even though Philip Morris was
25 paying my legal fees at that time, it was a prudent

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1 thing to do.

2 Q And it was a prudent thing to do,
3 regardless of whether the documents and the history
4 of the tobacco litigation was favorable to Liggett
5 or unfavorable to Liggett, it was still a prudent
6 thing to do settlementwise?

7 A Absolutely. At that point in time, that's
8 absolutely true.

9 Q And that's the way you looked at it from
10 your standpoint for Liggett?

11 A I had no other facts to go on at that
12 time. All I had was my -- were my suspicions.

13 Q And you proceeded with your Kasowitz
14 lawyers to try to strike that deal?

15 A Correct.

16 Q And another incentive you had in striking
17 that deal was in addition to getting out the frying
18 pan, so to speak, from the standpoint of these
19 liability suits, you also might be able to structure
20 it in a way that gave you an advantage in your
21 consent solicitation fight with RJR Nabisco?

22 MR. BENSON: Objection.

23 A Proxy; not consent solicitation.

24 BY MR. VAUGHAN:

25 Q Well, now in the proxy fight, in the proxy

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1 fight with RJR Nabisco?

2 A Possibly, yes.

3 Q And, in fact, you structured a deal that

4 was designed to do exactly that?

5 A Correct.

6 Q And you took that deal and waved it to the
7 shareholders of RJR Nabisco as a way that they could
8 limit the exposure of their company, as you saw it,
9 and at the same time spin off the food business?

10 A Correct.

11 Q And the result of that deal would have
12 been -- would have been a combination of Liggett and
13 R. J. Reynolds Tobacco Company?

14 A No, that was not a guarantee. That was up
15 to the shareholders.

16 Q It was up to the shareholders?

17 A Right.

18 Q And the board of the new RJR Nabisco?

19 A No, not the board, just the shareholders.

20 Q What I'm trying to ask you, Mr. LeBow, is
21 whether when you went back to the RJR shareholders,
22 in your mind you had a deal that you wanted to wave
23 to them and convince them to sign on too so that
24 ultimately Liggett could be combined with R. J.
25 Reynolds Tobacco Company?

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1 MR. BENSON: Objection. He's answered it
2 about 18 times.

3 A If the shareholders approved, subject to
4 their sole discretion, sole approval, yes.

5 Q And you tried to structure the deal in a
6 way that would give him an incentive to do so?

7 MR. BENSON: Objection.

8 A Excuse me. The deal was also structured
9 in such a way that any other tobacco company would
10 get the same benefit, or could get the same benefit,
11 if their shareholders were to approve it. So it was
12 up to any company that wanted to get these -- this
13 benefit of this deal, except Philip Morris in '74.
14 Any other tobacco companies could have gotten the
15 same benefit.

16 Q And you were willing to talk to the other
17 companies as well as a businessman?

18 A Yeah, of course. I had a fiduciary
19 responsibility. I must talk to them.

20 Q Another result was you lost the proxy
21 fight, didn't you?

22 A Very badly, yes. All of the shareholders
23 voted against it after they saw the settlement. And
24 a lot of the shareholders, I will add, you know, are
25 also Philip Morris shareholders simultaneously. I

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1 think if we had that vote today it would be a
2 different story, but that's a different issue.

3 Q And, furthermore, after this settlement
4 was reached Liggett's financial condition continued
5 to deteriorate, didn't it?

6 A I'd say it somewhat accelerated.

7 Q The deterioration accelerated?

8 A Yes. The revenue sales accelerated --

9 declined, accelerated.

10 Q We've spent some time over the last couple
11 of days talking about Philip Morris' payment of
12 legal fees for Liggett in defense of smoking and
13 health cases.

14 Do you recall whether there was
15 correspondence between Philip Morris and Liggett
16 and/or Brook with respect to those matters?

17 A Yes.

18 Q Do you recall, insofar as the terms of the
19 arrangement were concerned, that Philip Morris
20 agreed as one of the terms that Liggett would
21 control the defense of its cases?

22 A Liggett would have the final say, yes.

23 Q And be able to direct the activities of
24 Mr. Kearney and the other lawyers defending the
25 case?

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1 A Yes.

2 Q After the first settlement was reached and
3 Mr. Kearney and his firm resigned, and later Mr.
4 Murray resigned, did there come a time where someone
5 from Mr. Kasowitz's office approached Mr. Kearney
6 about representing Liggett again in some other
7 cases?

8 A Yes.

9 Q And did they talk with you before they did
10 that?

11 A They may have, yes.

12 Q And was an arrangement reached with Mr.
13 Kearney and Latham & Watkins for Mr. Kearney and
14 Latham & Watkins to defend Liggett's interest in
15 litigation along with the Kasowitz firm?

16 A This was in a couple very individual
17 cases, a couple that they had done a lot of work on,
18 not in any of the class actions or any of the
19 Attorneys General or any of the major cases, just a
20 couple -- I think one or two, maybe tops three, very
21 limited cases that the other companies were still
22 involved in too.

23 Q And the Kasowitz firm was satisfied with
24 that approach?

25 A Well, is was -- it was -- there was really

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1 no choice because they had the knowledge of those
2 cases. We were kind of in a box. Theoretically
3 they had the knowledge, and they weren't important
4 cases at all. We didn't expect anything to happen
5 with them because we had a settlement agreement.

6 Q Well, the Castano settlement applied to
7 the national class action, did it not?

8 A Yeah, but the class action then overtook,
9 you know, the various individuals.

10 Q But individuals were allowed to opt out of
11 that class and pursue their own claims, weren't
12 they?

13 A I don't recall. Probably. Yes. I think

14 they were, yes.

15 Q And in any event, once the class action --
16 Castano class action was decertified, these other
17 cases continued to exist?

18 A Right. There were still a couple of small
19 cases around, right.

20 Q And under the terms of that arrangement
21 that was reached, Philip Morris was to pay the legal
22 fees?

23 A Yeah, they continued paying some legal
24 fees, some minor legal fees for a couple minor
25 cases.

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1 Q Well, they agreed to pay the legal fees
2 for Mr. Kearney and Latham & Watkins to assist in
3 the defense of the cases?

4 A Yes, because they had an interest in those
5 cases, Philip Morris. But they would not pay Mr.
6 Kasowitz's fees. They made that very clear.

7 Q They had an interest in those cases to see
8 that sufficient resources were available to defend
9 the cases properly?

10 A I believe they had their own interest at
11 heart, not my interest at heart at all at that point
12 in time. They made that very clear. So this then
13 brought into question, who was Mr. Kearney really
14 working for.

15 Q And their own interest being that they
16 didn't want any tobacco company to lose a lawsuit

17 simply because it didn't have enough money to defend
18 itself?

19 A Well, why would they care about that?

20 Q But that was the interest you understood
21 that they had, right?

22 A I don't know. You'd have to ask them what
23 their interest was.

24 Q No one ever communicated to you what the
25 interest was?

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1 A No. Not in detail, no.

2 Q The Kasowitz's lawyers never told you what
3 the interest was?

4 A What, what Philip Morris' interest was?

5 Q Why Philip Morris was paying the legal
6 fees for Liggett.

7 A They were interested in making sure that
8 there was some defense. But why they care, I don't
9 know. They don't care about me today, so why would
10 they care about me then?

11 Q Let me show you what we have marked as
12 LeBow Exhibit No. 1363 styled "Settlement
13 Agreement."

14 Is that document -- feel free to look
15 through it if you wish to do so, the settlement
16 agreement -- the first settlement agreement that you
17 reached, namely with the Castano plaintiffs?

18 A It appears to be, yes.

19 Q Turn your attention to Paragraph D on Page
20 2. Does that contain a paragraph to effect that
21 Liggett and Brook continued to deny any liability or
22 any wrongdoing with respect to smoking and health
23 issues?

24 A That's what it says.

25 Q And that paragraph was in it when you

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1 signed it, wasn't it?

2 A Uh-huh.

3 Q And then, if you would, look to Paragraph
4 G down below. Let me see that for just one second,
5 Mr. LeBow, so I can ask you a question about it.

6 A Uh-huh.

7 Q And that paragraph acknowledges, in part,
8 that certain reasons for trying to settle the case,
9 notwithstanding the denials of liability or the
10 expense of proceeding to trial, and the uncertainty
11 as to outcome?

12 A Right. But that was our -- our expense.
13 Philip Morris was not going to pay our fees in this
14 case, so it was my risk.

15 Q Earlier today you were asked about your
16 testimony concerning addiction in Mr. Rosenblatt's
17 deposition in 1993. Do you recall that?

18 A Yes.

19 Q And I believe you said that what you
20 recalled testifying to was that, based on your
21 personal experience in being able to quit that you

22 did not believe that smoking was addictive; is that
23 right?

24 A Yes.

25 Q Actually, you went a little further than

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1 that, didn't you, Mr. LeBow?

2 A I don't recall.

3 Q Go to Page 25 then.

4 A Okay.

5 Q And he was asking you about your quitting
6 at the first part of that page?

7 A Uh-huh.

8 Q And then you were asked the question:
9 "Millions of people say they can't do it, they want
10 to quit and they can't" -- and there was an
11 objection from Mr. Kearney. And Mr. Rosenblatt
12 continued with the question, "Do you buy that," did
13 he not?

14 A Yes.

15 Q And he asked that again by saying: "Do
16 you buy that, that there were millions of people who
17 would love to quit smoking but say they can't?" He
18 asked you that question, didn't he?

19 A Yes.

20 Q And you answered, "No, I don't buy that;"
21 is that right?

22 A Uh-huh.

23 Q And he asked you, "Why;" is that right?

24 A Yes.

25 Q And you answered at that time, "because I

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1 have seen myself and other people quit like that."

2 Again, indicating something quickly.

3 A Uh-huh.

4 Q Now, the next question was, "But have you
5 not also seen the other side of the coin, people who
6 really want to quit and who can't; they're not as
7 strong -- they're not as strong as you and the other
8 people that can't quit just like that?"

9 Were you asked that question?

10 A Uh-huh.

11 Q Is that a yes?

12 A Yes.

13 Q And did you answer, "No, I have seen more
14 the other way"?

15 A Meaning I have seen other people also who
16 can't quit, but more who could quit.

17 Q And in the next question --

18 A That's a personal -- a personal experience
19 thing.

20 Q And so in order to be sure he had nailed
21 it down he again asked you, did he not, "You don't
22 believe that tobacco is addictive?"

23 He asked that question, didn't he?

24 A Yeah, based on my personal experience.

25 Q Did he ask you that question?

1 A He asked that question.

2 Q And your answer was, "No, I do not"?

3 A At that time, that's what I believed.

4 Q Now, continuing, Mr. LeBow, to 1996, and
5 specifically to the proxy -- well, to the -- yeah,
6 to the proxy fight.

7 Let me have this next document marked by
8 whatever number we're up to at this time.

9 Do you recognize that document, Mr. LeBow?

10 A I don't recognize it off hand, but it's
11 apparently one of our documents.

12 Q So you do remember the document then?

13 A I vaguely remember it.

14 Q Let's turn to Page 4 of that document.

15 A These documents aren't paged -- aren't
16 numbered.

17 Q Okay. If you would --

18 A I could count.

19 Q If you would, please.

20 A One, two, three, four. Okay. It does
21 have a four.

22 Q Would you look at the last paragraph on
23 that letter --

24 A Uh-huh.

25 Q -- on that page?

1 A Right.

2 Q Now, in that particular solicitation to
3 RJR Nabisco shareholders you say, do you not, in --
4 "On April 5, 1996, that together with the other
5 tobacco companies we believe that the addiction
6 theory is flawed."

7 Do you say that?

8 A That's what the letter says, yes.

9 Q Does it also go on to say, "Tens of
10 millions of former smokers who chose to stop smoking
11 were able to do so successfully, and public health
12 officials from the Surgeon General of the United
13 States on down readily acknowledge that it is
14 possible to stop smoking"?

15 A Well, millions of people have stopped
16 smoking, but millions of people haven't, also.

17 Q And that was a statement of your and Brook
18 and Liggett's position as of April 5, 1996; is that
19 right?

20 A Again, we have not reviewed any of the
21 documents prior to this.

22 Q But you had heard the plaintiffs' claims
23 made during and before settlement negotiations
24 commenced to settle the Castano lawsuit, hadn't you?

25 A Yes.

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1 Q Now, before lunch we had gotten down and
2 through the settlement that you reached with the

3 Castano plaintiffs and the results -- or at least
4 some of the results of that settlement?

5 A Correct.

6 Q And we talked about a continuing
7 deterioration in the financial condition of
8 Liggett. In fact, I believe you said it accelerated
9 after that settlement?

10 A After the first settlement, yes.

11 Q While that condition of the
12 company -- or while the financial condition of the
13 company was getting worse, the number of cases was
14 increasing, wasn't it?

15 A What kind of cases?

16 Q Attorney Generals cases.

17 A Oh, yes.

18 Q They went from five or six cases, I think
19 we said before, to double digits?

20 A But Liggett was not mentioned in every one
21 of those cases.

22 Q Not in every one, but they were mentioned
23 in enough to cause --

24 A Yes.

25 Q -- to cause significant financial concern

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1 for you as CEO of Brook?

2 A Not immediate concern. We had other
3 concerns besides that. Those trials were years off,
4 so it was not an immediate concern.

5 Q But you had more pressing concerns, but

6 you also had concerns about those cases?

7 A On the basis of them needing concern, yes,
8 they're a concern.

9 Q And, in fact, some of those trials were
10 scheduled to come to trial within a year or two,
11 weren't they?

12 A Yes.

13 Q You concluded that Liggett needed to
14 settle those cases?

15 A And Liggett needed to do the right thing.

16 Q And that was before you had looked at any
17 documents?

18 A No.

19 Q When did you commence looking at
20 documents?

21 A Within a month or so after the first
22 settlement. Not me again, my attorneys.

23 Q Now, we went through that yesterday so
24 we're not going to go through back through it again
25 right now.

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1 A Right.

2 Q But you undertook to try to reach a
3 settlement with the Attorneys General?

4 A Well, part of our original deal in March
5 of '96, we had let -- we had, by definition, knew
6 there were more cases to be settled. We started
7 that immediately. That was nothing new there. It

8 has nothing to do with any new cases. I mean, I
9 think a week after the March '96 settlement we had a
10 meeting with Texas to try and settle that. And, you
11 know, we had a commitment from the other Attorney
12 General that did settle with us that they would help
13 us settle the rest of the other lawsuits.

14 Q So you started trying to settle those
15 Attorney General cases right after the Castano case?

16 A No, right after the March '96 settlement
17 agreement, immediately.

18 Q Right after the settlement of that case?

19 A Absolutely. That was part of the original
20 deal.

21 Q And so that was itself still before you
22 commenced any internal review of any kind of
23 documents?

24 A Correct.

25 Q So you had made that decision not knowing

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1 what was in those documents or what Liggett
2 scientist would say, but had made that decision
3 because it made business sense to you to do so?

4 A Well, I made that decision to settle all
5 lawsuits, if I could, in March of '96. Now, we had
6 one meeting about a week after that, and then there
7 were no meetings after that, no conversation for
8 quite a few months while we studied the documents.

9 Q Now, when you got to the settlement
10 with the -- to the actual settlement with the

11 Attorneys General --

12 A The second settlement?

13 Q The second settlement, the one in March of
14 1997.

15 A Correct.

16 Q That settlement, I believe you testified
17 yesterday, contained some financial terms?

18 A Yes.

19 Q And those financial terms were terms that
20 you describe as being necessary for Liggett to
21 survive?

22 A Yes.

23 Q Actually reaching a settlement with the
24 AGs was necessary for Liggett to survive?

25 A Right. Everything to survive, yes.

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1 Q Now, as far as the financial term for
2 concern, do you recall what Liggett was to pay in
3 dollars?

4 A Assuming we got full protection from all
5 of the Attorneys General and all of the -- and under
6 a class action, which was being filed in Alabama, we
7 would paid 27 and-a-half percent of our pretax
8 earnings.

9 Q Which were how much for 1996?

10 A Negative.

11 Q How much would that be for 1997?

12 A A very small amount. Obviously I don't

13 know the answer yet because '97 is not over.

14 Q Would you agree, Mr. LeBow, that the
15 Attorneys General and their lawyers settling with
16 you in this second settlement knew that Liggett was
17 in difficult financial circumstances?

18 A That was all public knowledge. No
19 secrets.

20 Q And would you agree that the dollars they
21 might take in from Liggett was not the primary
22 reason they settled in March of 1997 with Liggett?

23 MR. BENSON: Objection. Objection.

24 A I think you'll have to ask them that
25 question, but they have pretty much said that to be

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1 true.

2 Q And you have no reason to doubt that
3 knowing your financial condition and being a
4 business man, do you?

5 A No reason to doubt that.

6 Q Well, what you were able to provide in
7 March of 1997 was some assistance in the pursuit of
8 their lawsuits?

9 A I was able to provide the truth for the
10 first time in this country.

11 Q You were able to provide them assistance
12 in pursuing your lawsuits?

13 A You call it assistance. I call it the
14 truth.

15 Q Well, you aren't willing -- I think you

16 told us earlier -- to provide the truth to states
17 that didn't settle with you, were you?
18 A But once it got through most of the
19 states -- these states weren't going to trial anyhow
20 for months -- for years, so it made no difference.
21 Q You said you didn't waive any privileges
22 to states that didn't settle with you, didn't you?
23 A Well, this was the intent to get them in.
24 If you recall -- if you read the document correctly,
25 there was no provision made for states who had not

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1 signed, so we had to have something for them to come
2 and sign. They were not part of the class action
3 either. They had the right to opt out in the class
4 action.
5 Q Mr. LeBow, if your only concern were
6 public health, there was nothing to prevent you from
7 coming and saying exactly what you said, turning
8 over documents, doing whatever you wanted to do to
9 assist the Attorney General, without reaching a
10 settlement agreement with them, was there?
11 MR. BENSON: Objection.
12 A Yes, because those documents could in
13 court then be used against us and bankrupt Liggett.
14 Q So you wanted to make sure Liggett was
15 protected?
16 A Absolutely. No question about it.
17 Q And in order to obtain that protection you

18 had to agree to do certain things?

19 A That's part of the deal. It wasn't -- you
20 know, it was all -- the whole involved, complicated
21 deal.

22 Q And one of those -- and these terms were
23 identified by the Attorneys General, what they
24 wanted, weren't they?

25 A They were negotiated.

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1 Q Well, they came up with the idea of having
2 to waive privileges on your documents, didn't they?

3 A No, I don't think so. No. I think
4 Kasowitz's firm came up with that idea.

5 Q Well, it was offered as an inducement for
6 them to settle?

7 A You call it what you want to call it, but
8 it was our offer and not their demand.

9 Q Now, the Attorneys General, once this was
10 raised by the Kasowitz firm, or by whoever --
11 whoever it was raised -- insisted that the provision
12 be in the document, didn't they, that you would
13 waive your privileges?

14 A Oh, yeah, sure.

15 Q In addition, you agree to make a public
16 statement, did you not?

17 A Correct.

18 Q Let me direct your attention to the
19 last -- you're welcome to read for the record all of
20 it, but I'm especially concerned with the part that

21 says, "We at Liggett." Beginning halfway down, if
22 you would read for the record the rest of that
23 paragraph.

24 A "We at Liggett know and acknowledge that
25 as the Surgeon General, respected medical

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1 researchers have found cigarette smoking causes
2 health problems, including lung cancer, heart and
3 vascular disease and emphysema. We at Liggett also
4 know and acknowledge that as the Surgeon General the
5 FDA and respected medical researchers" --

6 THE COURT REPORTER: I'm sorry.

7 A "And respected" -- I'm sorry.

8 "We at Liggett also know and acknowledge
9 that as the Surgeon General, the Food and Drug
10 Administration and respected medical researchers
11 have found nicotine is addictive."

12 Q Both of those sentences began with "We at
13 Liggett;" is that right?

14 A Correct.

15 Q Did you go and talk to the management at
16 Liggett?

17 A The -- I'm trying to remember now. I
18 believe Mr. Fulford was a part of this. He saw all
19 this.

20 Q Did you -- we can go back through the
21 depositions if you wish.

22 Did you not tell Mr. Grossman that you

23 handled some of this case?

24 A Yeah. But I negotiated most of the

25 settlement, but Mr. Fulford was part of this. He

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1 saw it prior to it being signed. He was kept

2 apprised of what was happening. He did not -- he

3 did not participate in the negotiations.

4 Q Is it your testimony that Mr. Fulford read

5 and affirmatively signed off on that statement?

6 A No, he did not sign anything. I signed

7 it.

8 Q Okay. When I say "signed off," I mean did

9 he tell you that he agreed to that statement?

10 A I don't know if he did or not. But he was

11 aware of it, let he's put it that way.

12 Q Did you consult with anyone else at

13 Liggett, scientists or otherwise, as to whether

14 Liggett -- the people at Liggett -- agreed with what

15 you were saying when you said "We at Liggett"?

16 A No, I did not.

17 MR. BENSON: Objection.

18 A No, I did not.

19 Q Since there is some question, and there

20 was a question raised yesterday about this

21 particular document we have shown you as being the

22 Attorneys General agreement, and specifically

23 whether that provision's -- the provision in there

24 that creates an incentive for other tobacco

25 companies to merge with your company.

1 Let me direct your attention to the 10K
2 you identified -- excuse me, 10Q you identified
3 earlier as the LeBow Exhibit 1362, and ask you to
4 look at the paragraph on the bottom of Page 23.

5 A Right.

6 Q That refers to both settlement agreements,
7 doesn't it?

8 A Yes.

9 Q And you're welcome to look at the earlier
10 pages, if you wish to do so --

11 A That's okay.

12 Q -- but those settlement agreements were
13 the ones we've been talking about, the one on the
14 Castano case, and the one with the AGs.

15 A Correct.

16 Q Does that paragraph -- excuse me just a
17 minute, Mr. LeBow -- provide that under both
18 settlement agreements any other tobacco company
19 defendant, except Philip Morris, merging or
20 combining with Liggett or BGL prior to the fourth
21 anniversary of the settlement agreements would
22 receive certain settlement benefits, including
23 limitations on potential liability and not having to
24 post a bond to appeal any future adverse judgment?

25 A That's what it says.

1 Q Does it also say, in addition, within 120
2 days following such a combination, Liggett will be
3 required to pay the settlement fund 25 million
4 dollars?

5 A Correct.

6 Q And does it also provide that both the
7 Attorneys General and the nationwide class have
8 agreed not to seek an injunction preventing any
9 defendant tobacco company combining with Liggett or
10 BGL spinning from spinning off any of its affiliates
11 which are not engaged in the domestic tobacco
12 business?

13 A Correct.

14 Q And does that 10Q accurately summarize
15 those provisions of the agreement?

16 A Well, you have to take -- you've got
17 to read it correctly. It says, "certain settlement"
18 -- give it back to me.

19 Q Certainly.

20 A You're reading it -- you're reading it,
21 and maybe it's poorly written, but it says, "certain
22 settlement benefits." And what it should say,
23 "including some limitations of potential
24 liabilities."

25 Q What does it say?

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1 A It just says, including limitations. It

2 doesn't say "including certain limitations." I mean
3 the word certain applies to both things. You're
4 ignoring the word "certain," which maybe should have
5 been in here. We could argue that from now or
6 forever.

7 Q I didn't ignore a word that was in there,
8 did I?

9 A No. But if you read the agreement, it's
10 clear in the actual agreement. This is a summary of
11 the agreement -- of the actual agreement. The
12 actual agreement is very clear that limitations or
13 potential liability, you know, is not limited for
14 the tobacco company.

15 Q But there are limitations on the liability
16 of the company?

17 A No. It says -- no. It says the company
18 would receive certain settlement benefits including
19 limitations, what limitations are defined here.
20 And, yes, there are certain limitations on
21 liability, but a limitation of liability are limited
22 to -- if you read this and if you ever get the right
23 copy and read it -- are limited to the parent
24 company only, not to the tobacco company.

25 Q Okay. But the intent of those provisions

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1 was to create an incentive for those companies to
2 join with you?

3 A Not the tobacco companies, the parents.

4 Q Didn't you say in your own Castano
5 agreement that what was driving you was not that you
6 admitted liability, but that you wanted to avoid
7 legal expenses and the uncertainty associated with
8 the outcome?

9 A Now, you're talking about just Liggett.
10 That's correct for Liggett. Again, that was before
11 we saw the documents.

12 Q Let me turn your attention back to the
13 deposition that was taken on July 18, 1997. If you
14 look at Page 162 -- well, let's start a little bit
15 early.

16 If you'll look back at 159 and come
17 forward, possibly even 158 if you want to to get the
18 context, Mr. Grossman was asking you, was he not,
19 why certain provisions under Paragraph 17 were
20 pertinent to the agreement?

21 A Yeah. What's your question?

22 Q And on Page 159 at Line 24 he asks you,
23 "And you asked for this provision, which was the
24 bond provision, so that if another tobacco company
25 were to lose a very big judgment, you could make a

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1 proxy run at that company and have the asset during
2 the proxy run of not having to make -- to have that
3 tobacco company or its parent or subsidiaries or
4 affiliates post a bond; is that correct?" And
5 that's what he asked you, wasn't it?

6 A That's why that provision was put in, yes.

7 Q That's what he asked you, wasn't it?
8 A Yes, but at this time --
9 Q And he -- is that right?
10 A Go ahead. Yes.
11 Q And your answer was, "that's correct"?
12 A That's correct. That was put in for that.
13 Q And then he said, did he not, "Again,
14 Paragraph 17.3 is of benefit to you, only if the
15 other tobacco companies were to lose the litigation;
16 is that correct?" Did he ask you that?
17 A Yes.
18 Q And did you answer, "that's correct"?
19 A Paragraph 17.3 has some benefit, right.
20 Q And then he said, "Now, Paragraph 17.4,
21 who asked for that provision?" And you answered,
22 "Again, these are all the same," did you not?
23 A Yes.
24 Q And you went on to say, "I'll concede
25 these are all the same, what they say." And you

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1 asked, "Do we have to go through each one of these;"
2 correct?
3 A Correct.
4 Q And he said, did he not, "No, I won't.
5 I'm just going through two more. As a matter of
6 fact, 17.4 you asked for; is that correct?"
7 And you answered, "I'm trying to
8 remember. I'm sure we asked for it. I think it

9 just relates to -- it's clarification of 17.2(b) or
10 something"?

11 A I don't know what your point is, but go
12 ahead.

13 Q And then he asked, "17.4 again is an
14 asset?" And you answered, "correct;" is that right?

15 A Correct.

16 Q And he went on to say, "Asset to you only
17 if the other tobacco companies lose?"

18 And you answered, "Correct;" is that
19 right?

20 A Right.

21 Q Mr. LeBow, let me show you what's been
22 marked as LeBow Exhibits 1365, 1366 and 1367.

23 (Change of reporter, 3:15 p.m.)

24

25

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1 Q Can you identify those documents?

2 A Yes, they are documents from Philip Morris
3 to Liggett regarding the payment of attorneys' fees.

4 Q And specifically, the payment of
5 attorneys' fees with respect to Mr. Kearney and
6 Latham & Watkins?

7 A That's correct.

8 Q Document 1365 and 1366 appear to contain
9 signatures for Liggett and Brook Group; is that
10 correct?

11 A Yes.

12 Q Did you sign 1365?
13 A Sixty-five, no. No, I didn't sign it.
14 Q Did someone -- did you sign any of the
15 three documents?
16 A Yes, I signed 1366.
17 Q Okay. 1366 is which document?
18 A The October 10th document.
19 Q How many meetings were you involved in
20 leading up to the settlement of the Castano case?
21 A Probably four to six, in that range.
22 Q Were they all with the same people?
23 A Sometimes attorneys sometimes would be
24 there; sometimes they wouldn't, different attorneys.
25 Q Were there particular sticking points in

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1 those negotiations?
2 A Yeah, there were many sticking points.
3 Q Which ones do you recall?
4 A I guess the biggest sticking point that --
5 initially was the percentage of profits, the money
6 issue, money -- bad lunch.
7 Q Was most of the discussion over dollars?
8 A No, it was over lots of other detailed
9 points about -- you know, lot of legal points, class
10 actions, opt in, opt out -- many, many issues.
11 Q Do you recall any others at this time?
12 A In fact, let me look at the agreement and
13 I will recall. I mean, we had a lot of detail.

14 Whatever is in the agreement. We negotiated every
15 single paragraph.

16 Q Every provision was -- was carefully
17 debated and discussed --

18 A Pretty much.

19 Q -- and negotiated?

20 A Yes.

21 Q When you came -- when it came time to
22 negotiate the Attorney General settlement, did you
23 participate in those negotiations?

24 A Yes.

25 Q With whom did -- well, first of all, who

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1 in your group negotiated, you and who else?

2 A The Kasowitz firm.

3 Q Okay. Any particular lawyers?

4 A Yeah, Mr. Benson here and Mr. Kasowitz and
5 Mr. Marks was involved, also.

6 Q Who was on the other side of the
7 negotiations?

8 A For the Attorneys General?

9 Q Yes. Who took the lead in the
10 negotiations?

11 A Which Attorneys General?

12 Q Yes.

13 A I think -- I guess I would probably say
14 Grant Woods from Arizona was the lead in that --
15 those negotiations and Warren -- Warren and Woods
16 pretty much.

17 Q Were others involved, as well?
18 A On occasion, yes.
19 Q Were any documents shown to the Attorneys
20 General as an indication of what documents you might
21 be producing?
22 A I don't know.
23 Q Were any -- was any of that done in your
24 presence?
25 A I just said, I don't know anything that

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1 was done. What kind of question is that?
2 Q Well, if it wasn't -- was anything done in
3 your presence, any sharing of privileged documents
4 of Liggett or any other company done in your
5 presence during those negotiations?
6 A No, I don't know.
7 Q Number one, you were asked just a moment
8 ago --
9 (Video interrupted)
10 MR. NYHAN: Your Honor, I think that
11 completes the --
12 (Video playing)
13 Q -- whether other companies could get the
14 benefits of the settlement agreements that you had
15 negotiated. Do you recall that?
16 A Certain benefits, yes.
17 Q And they obtained those benefits --
18 (Video interrupted)

19 THE COURT: Does that complete the portion
20 of the deposition?

21 MR. NYHAN: I believe it does. I may need
22 to check. Can I have just a moment?

23 THE COURT: Sure.

24 (Discussion off record)

25 MR. NYHAN: Apparently there's just a bit

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1 more, much to everyone's relief, I'm sure.

2 THE COURT: All right.

3 (Video continues)

4 Q -- only if they become affiliates of
5 Liggett and Brook; is that right?

6 A That's correct.

7 Q Second, with respect to the various
8 documents you were just presented, had you ever seen
9 those documents before today?

10 A No.

11 Q Were you familiar with the authors or did
12 you know the authors of those documents?

13 A No, I didn't know any of the authors.

14 Q In answering the questions that were put
15 to you, were you -- well, strike that.

16 Have you reviewed any other documents
17 since yesterday concerning smoking and health
18 issues?

19 A No.

20 Q Was your basis for answering the questions
21 that were put to you with respect to the documents

22 therefore based on your personal beliefs, your
23 conferences with lawyers in the Kasowitz firm, your
24 review of the eight documents released by the Court
25 in Florida and what you have read in the Popular

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1 Press?

2 A That's correct.

3 Q And on nothing else?

4 A That's correct.

5 Q Thank you.

6 A I should say my review of these documents
7 themselves, as I read them.

8 Q And by "these documents," you mean the
9 documents that you were handed by counsel just a few
10 moments ago?

11 A Correct.

12 (Video stopped)

13 MR. NYHAN: That concludes it, Your Honor.

14 THE COURT: All right. We will take the
15 afternoon break. Turn on the lights, please.

16 Ladies and gentlemen, it's 20 after
17 three. We're going to take the mid-afternoon
18 break. Please do not discuss the case among
19 yourselves or with anyone else. If you're in the
20 jury room at 20 till four, we'll be able to start
21 right at 3:40.

22 THE BAILIFF: Court is in recess.

23 (Jury exits courtroom; recess)

24 THE BAILIFF: All rise, please. This
25 court is back in session.

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1 THE COURT: Would counsel approach the
2 side bar a minute, please. I don't need the court
3 reporter.

4 (Side bar, Court and counsel)

5 THE COURT: Are you ready to proceed,
6 Mr. Matthews?

7 MR. MATTHEWS: Yes, Your Honor.

8 THE COURT: Mr. Nyhan?

9 MR. NYHAN: Yes, Your Honor, we are.

10 THE COURT: Bring them in, please.

11 (Jury enters courtroom)

12 THE COURT: All right, Mr. Nyhan, I
13 believe you were going to present some further
14 testimony of Mr. LeBow.

15 MR. NYHAN: Yes, Your Honor, we are. We'd
16 like to read from Mr. LeBow's testimony of
17 February 10, 1998, and there isn't much to it.

18 THE COURT: All right. And this is
19 Mr. Silverman?

20 MR. NYHAN: This is Dan Silverman who will
21 be reading the answers that Mr. LeBow gave to the
22 following questions.

23 THE COURT: All right. Again, you're to
24 treat it just as if Mr. LeBow was sitting here on
25 the stand as you did the video and the other

1 depositions. And Mr. Silverman will answer the
2 questions as if he were Mr. LeBow.

3 MR. NYHAN: Thank you, Your Honor.

4 (The following transcript was read.)

5 Q Did you tell the jury yesterday that you
6 not only settled with the state, that you had
7 contractually promised to assist the Attorney
8 Generals and their lawyers in their lawsuits against
9 these companies?

10 A We -- we agreed to release all of the
11 documents and to testify if requested, and that's
12 what we're doing.

13 Q Let me ask you this: A contractual
14 promise to cooperate with the lawyers and the
15 parties, that's an important fact, isn't it?

16 A I think it's -- well, you know, yeah.
17 Yes, it's an important fact. I'm happy we're doing
18 this.

19 Q And that's an important fact for a
20 fact-finder to know with respect to testimony, isn't
21 it, that there's a contractual promise to help one
22 party?

23 A What is a fact-finder, please?

24 Q The jury.

25 A Oh.

1 Q Indeed, if you were a fact-finder and you
2 wanted to evaluate someone's testimony, you'd want
3 to know whether they got a contractual promise to
4 cooperate with one party in the lawsuit, wouldn't
5 you?

6 A We had a contractual promise to supply all
7 of our documents, release all of our privileges and
8 to testify, if requested, and that's what we're
9 doing.

10 Q Let me turn you, if I could, Mr. LeBow --
11 well, let me ask for an answer to that question.
12 That's an important fact for the fact-finder to
13 know, isn't it?

14 A Yes. In that context, yes.

15 Q Now, turn to the agreement -- the same
16 agreement we've been dealing with right at the
17 beginning in one of the whereas clauses labeled E.

18 Did you find that, sir?

19 A Yes, I have it.

20 Q Could you read E to the jury?

21 A "The Attorneys General acknowledge and
22 agree that this settlement agreement, including
23 the cooperation provisions thereof, are important
24 to the prosecution of their actions against the
25 non-settling defendants."

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1 Q Now, the agreement has numerous other
2 provisions requiring you to cooperate with the

3 lawyers for the state, does it not, Mr. LeBow?

4 A In what sense?

5 Q Well, let's turn to 4.3.1.

6 Okay. Do you have that?

7 A Yes, I do.

8 Q All right. Okay. That says that each
9 settling defendant -- and that's Liggett and Brook,
10 correct?

11 A Correct.

12 Q That says that they will cooperate with
13 the Attorney General and the attorneys representing
14 the Attorney General, correct?

15 A Correct.

16 Q Okay. Could you turn to 4.3.1 (3), two
17 paragraphs down.

18 A Yes.

19 Q And that's in the middle there. That says
20 that you've agreed to actively assist the attorneys
21 representing the Attorneys General in locating
22 witnesses, et cetera, correct?

23 A Correct.

24 Q And you shall -- down here at the end,
25 Mr. LeBow -- shall actively assist counsel in

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1 interpreting documents relating to litigation. Do
2 you see that?

3 A Yes.

4 Q The question is: That's what you were
5 doing here yesterday, Mr. LeBow, isn't it, actively

6 assisting counsel in interpreting documents?

7 A I think any witness on the stand is doing
8 that. I don't see anything special that's being
9 done there. I was just reading the documents and
10 giving my personal opinion on them.

11 Q Well, let's turn to 4.3.2 (3), Mr. LeBow.

12 A That's the same place you are now, right?

13 Q No, this is 4.

14 A Okay.

15 Q You with me?

16 A Yes.

17 Q It starts out, quote, offer their
18 employees, close quote.

19 A Yes, I have it.

20 Q Okay. And it talks about offer employees
21 to testify in deposition, at trial, correct?

22 A Correct.

23 Q And you've come here voluntarily at the
24 request of the state, have you not, sir?

25 A That is correct.

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1 Q You believe you have fully cooperated with
2 the Attorneys General and their lawyers pursuant to
3 that agreement, correct?

4 A As I say, we waived our attorney/client
5 privilege, we released all of our documents, and
6 I've been here, you know, appearing as a witness.

7 Q And you believe you've cooperated fully,

8 correct?

9 A As of right now, yes.

10 Q Now, another part of the agreement was

11 that the Attorneys General demanded that you,

12 Bennett LeBow, personally make a statement, correct?

13 A Correct.

14 Q Not Liggett or Brook, but you, Bennett

15 LeBow.

16 A Either way.

17 Q Well, it was a personal statement by

18 Bennett LeBow, correct?

19 A On behalf of myself and on behalf of

20 Liggett and Brook.

21 Q And as a matter of fact, it was written

22 right in the agreement with the language above,

23 quote, I, Bennett LeBow, close quote, correct?

24 A Correct.

25 Q And that was a negotiated statement,

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1 correct?

2 A The lawyers negotiated some of the words,

3 yes.

4 Q There were several drafts of that, correct?

5 A I wasn't aware of that. I don't know.

6 Q Had you ever negotiated a personal

7 statement that you were going to make before?

8 A Not that I recall.

9 Q Now, during these negotiations, to your

10 knowledge, there was nothing they asked you to say,

11 no statement they required that you didn't agree to
12 say; isn't that true?

13 A That's absolutely true.

14 Q You did insist on the insertion of one
15 sentence in there, did you not, and that's the
16 sentence that says, "I personally am not a
17 scientist." Do you see that?

18 A I don't know if I insisted upon that or my
19 lawyers insisted upon that.

20 Q But that was a request from your side?

21 A From our side, I believe so, yes. I'm not
22 sure of that. I'm not so sure. It could have been
23 from the other side, too. I don't recall.

24 Q Turn to -- see if this refreshes your
25 recollection. Turn to your 1997 deposition in the

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1 Broin case at page 93, if you would, please.

2 It's page 93, starting at line 15. And
3 let me ask you if you were asked this question and
4 gave this answer.

5 Question: And so you asked for the
6 insertion of the language, quote, I personally am
7 not a scientist, period, unquote.

8 Answer: Yes. Obviously I can't give
9 expert opinions in these types of things.

10 Correct?

11 A Correct.

12 Q And you didn't mean in this statement in

13 section 4.1 to speak as an expert, did you,

14 Mr. LeBow?

15 A I'm not a scientist, as I've said many
16 times.

17 Q And you didn't mean to speak to the jury
18 yesterday as an expert on any matter of science, did
19 you?

20 A Not as an expert in science. As you know,
21 CEO and owner of a tobacco company, I did.

22 Q And your opinions on matters of science
23 are just that, your personal opinions as a layman,
24 correct?

25 A Obviously.

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1 Q And everybody has got those, correct?

2 A Everyone has their own opinion, yes.

3 Q Now, let's go to the second sentence of
4 section 4.1, which is this negotiated statement
5 we've been talking about, and that's the one that
6 says, quote, Cigarettes were identified as a cause
7 of lung cancer and other diseases as early as 1950,
8 close quote. Do you see that, sir?

9 A Yes.

10 Q Now, you didn't know that at the time you
11 signed this agreement, did you, that they were
12 identified as a cause of lung cancer as early as
13 1950?

14 A I was told that by my attorneys, yes.

15 Q Right. You were told that at the time,

16 correct?

17 A Yes.

18 Q And that was -- you were given that
19 information by your attorneys?

20 A Well, and I read it in the Popular Press
21 in cases like this.

22 Q But, I mean, you've stated before, have
23 you not, Mr. LeBow, that this statement about 1950
24 was information you got at the time of the
25 negotiations?

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1 A Or before. They were during the
2 negotiations, yes.

3 Q Now, you don't personally know that
4 statement is true, do you?

5 A Well, I saw some documents yesterday which
6 kind of, you know, indicate it's true.

7 Q You don't -- you didn't look at the
8 scientific literature to see what was out there, did
9 you, Mr. LeBow?

10 A No. I am not a scientist. I didn't look.

11 Q And your lawyers aren't scientists or
12 doctors, are they?

13 A Not to my knowledge.

14 Q Let's go to the third sentence now, if you
15 could, please. That's the one that begins -- well,
16 actually one, two, three, four, the fourth
17 sentence. Quote: But like all of you, I am aware

18 of the many reports concerning the ill-effects of
19 cigarette smoking, close quote. Do you see that,
20 sir?

21 A Yes.

22 Q And you didn't need your lawyers to tell
23 you that fact, did you, that the public had long
24 been aware of the ill-effects of cigarette smoking?

25 A No.

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1 Q Indeed, you spoke to us yesterday about
2 your knowledge on the 1964 Surgeon General's report,
3 correct?

4 A I don't recall yesterday --

5 Q Okay.

6 A -- exactly what I said.

7 Q Well, let me see if this reminds you. You
8 said that one of the things that was in your mind
9 when you decided to quit smoking had been the
10 publicity associated with the 1964 Surgeon General's
11 report, correct?

12 A That's correct.

13 (Change of reporters, 4:05 p.m.)

14

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1 Q And when the 1964 Surgeon General's report
2 came out, Mr. LeBow, that wasn't the first time you as
3 an individual had heard that smoking might carry health
4 risks, correct?
5 A In 1964?
6 Q Right.
7 A I don't recall back 30 years.
8 Q You don't?
9 A No.
10 Q Okay.
11 A Exactly.
12 Q Okay. Now it's also true, is it not, with
13 respect to the knowledge of the ill-effects of cigarette
14 smoking that the warnings have been on the packs since
15 1966. You know that, don't you, sir?
16 A Some of the warnings have been, yes.
17 Q Except for your agreed-upon warning, correct?
18 A Except for the addiction warning.
19 Q Now let me go to the next sentence which
20 begins, quote, We at Liggett, close quote. Do you see
21 that, sir?
22 A Yes.
23 Q Now, again, this is a statement you agreed to
24 make, correct?
25 A Correct.

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1 Q That was negotiated with the Attorneys
2 General, correct?
3 A Correct.
4 Q Now when you said, quote, We at Liggett,
5 close quote, and that sentence goes on to say,
6 "acknowledge that smoking can cause disease," but when
7 you said, "We at Liggett," when you made that statement,
8 you had never checked with any scientists at Liggett
9 about what their advice or opinion might be on that very
10 issue, had you, sir?
11 A That's correct. I don't think we have any
12 scientists, as you know, currently.
13 Q Now, but you didn't check, did you?
14 A No, I did not check.
15 Q So, clearly, when you said on March 20, 1997,
16 "We at Liggett," what you were talking about was I,
17 Bennett LeBow, correct?
18 A No. My lawyers had -- had advised me that

19 Liggett's documents, you know, supported these
20 statements; that given that information, I support what
21 they said.

22 Q So it was based on what you believed and what
23 your lawyers told you?

24 A From the documents that they reviewed over a
25 period of six months, yes.

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1 Q And you hadn't reviewed those documents?

2 A I had not personally reviewed the documents,
3 no.

4 Q Now it goes on to say that, in the same
5 sentence about We at Liggett, "acknowledged that smoking
6 causes certain health problems," correct?

7 A Correct.

8 Q Now as you said yesterday, you had been aware
9 prior to this time about Liggett's prior position which
10 had been that smoking was a statistical risk factor, not
11 a proven cause of disease, correct?

12 A From the previous attorneys I had been aware
13 of that, yes.

14 Q And hadn't you been generally just aware of
15 that from your management of the company over the years,
16 that the position was that smoking was a statistically
17 associated risk factor, not a proven cause?

18 A Again, principally from the attorneys, not
19 the management per se.

20 Q But you clearly knew that at the time?

21 A Oh, yes. That was the industry position at
22 the time.

23 Q Now, isn't it true that when you agreed in
24 this negotiation to say, quote, cause, close quote, and
25 include the word "cause" in that sentence, you didn't

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1 even know what was the difference between a risk factor
2 and a cause; isn't that true?

3 A As I said before, I am not a scientist.

4 Q So the answer to my question is no, you
5 didn't know the difference, did you?

6 A The scientific difference? No.

7 Q Okay. Now, sir, let me turn you to the next
8 section in 4.1. We will go right down it. Also, the
9 last sentence it talks about, We at Liggett. And it
10 went on to say that nicotine is addictive; correct, sir?

11 A Correct.

12 Q And again, with respect to the, We at
13 Liggett, you hadn't checked with any scientists at
14 Liggett about this at the time you made that statement,
15 correct?

16 A Again, it came from my attorneys, not from
17 checking with scientists that we don't have, so I had no
18 scientist to check with.

19 Q Okay. So the answer is no?

20 A No.

21 Q As a matter of fact, at that time you hadn't
22 checked with any other scientist, had you, Mr. LeBow?

23 A No.

24 Q Now in two of these -- section 17.3 and
25 section 17.4 -- two of these sections are only of value
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1 to Liggett if one of the other companies loses a case;
2 correct?

3 A Yes.

4 Q And based on these provisions and the other
5 provisions of the agreement, including your cooperation
6 provisions, it's true that Brook has an economic
7 incentive to see the other tobacco companies lose their
8 litigation against the Attorneys General; isn't that
9 true?

10 A Well, you are looking at 17.3 and 17.4 only.
11 Theoretically, you know, you can make that -- kind of
12 make that statement, but that's not the intent here.

13 Q My question is, Brook has an economic
14 incentive to see the other tobacco companies lose their
15 litigation against the Attorneys General; correct or
16 not?

17 A I don't think that's correct because 17.3 and
18 17.4 are totally under the control of the other tobacco
19 companies. We have no control over this.

20 Q Well, not limiting it to 17.3 and 17.4,
21 Brook, but including that, Brook has an economic
22 incentive to see the other tobacco companies lose in the
23 litigation against the Attorneys General; isn't that
24 true?

25 A I don't see how you say that. On what basis?
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1 Q Okay. Could you turn, Mr. LeBow, to the
2 deposition -- do you have it?

3 A I have it. I have it.

4 Q That's 91. Could you turn to page 162, line
5 16. See if you remember being asked these questions and
6 giving these answers:

7 Question: Based on all of this, you have an
8 economic incentive to see the other tobacco companies
9 lose pending litigation against the Attorney Generals;
10 isn't that correct?

11 There was an objection. And then you
12 answered --

13 Well, I would think even on a competitive
14 basis. If I have a settlement and they lose, I am
15 obviously in a competitive advantage, forgetting any
16 agreements, and that would be true of almost anyone.

17 Question: And so the answer would be yes; is
18 that correct?

19 Answer: The answer would be yes.

20 A The answer is yes, with that qualification
21 prior that you have there. The answer I gave on "a
22 competitive basis," it would be true also if you had a
23 judgment against them. They would have a competitive --

24 MR. MATTHEWS: I'm sorry. It's beyond the
25 designation we had listed. I don't know if there's an
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1 addition.
2 MR. NYHAN: I think that's the tail end of
3 it. We will finish down to line 23.
4 MR. MATTHEWS: I have through line 14. Let
5 me read it real quick.
6 (Pause)
7 MR. MATTHEWS: I have no objections.
8 MR. NYHAN: Okay. Let me just put it back in
9 context.
10 You answered: Well, I would think even on a
11 competitive basis if I have a settlement and they lose,
12 I am obviously in a competitive advantage, forgetting
13 any agreements, and that would be true of almost anyone.
14 Question: And so the answer would be yes; is
15 that correct?
16 Answer: The answer would be yes.
17 A The answer is yes with that qualification
18 prior that you have there. The answer I gave on "a
19 competitive basis," it would be also true if you had a
20 judgment against them. They would have a competitive
21 advantage. So it works both ways. So I don't see what
22 you are talking about.
23 Q Those were the questions you were asked and
24 the answers you gave, correct?
25 A That's what it says.
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1 MR. NYHAN: That concludes it, Your Honor.
2 May we be heard at sidebar for a moment?
3 THE COURT: All right.
4 (Side-bar conference held outside the hearing
5 of the jury)
6 MR. NYHAN: Your Honor, I request permission
7 to publish to the jury at this time the fact that
8 Mr. LeBow and his companies have signed an agreement
9 with plaintiffs' counsel in this case, and it's relevant
10 to show the bias that that witness has in the testimony
11 that was offered. These folks are down in an Alabama
12 class action --
13 THE COURT: Yeah, okay.
14 MR. NYHAN: -- that's been -- he referred to
15 this in the testimony he gave here, and I think it's
16 only fair that we be allowed to tell the jury that among
17 the parties he settled with is this law firm.
18 MR. MATTHEWS: Judge, they are now attempting
19 to put on their own evidence. He can do this over our
20 objection if he wants to in his case in chief. We've
21 read that deposition. We designated portions; they've
22 counter-designated portions, and now he is getting into
23 an area that's totally different. If he wants to put it
24 in his case, that's --
25 THE COURT: I don't think I will allow it at
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1 this time.
2 MR. NYHAN: All right.
3 THE COURT: But I am not sure how I would
4 rule on it if you attempt to present it in your case.

5 MR. MATTHEWS: And I would like him to advise
6 me if they intend to read it out of a deposition, if
7 they would provide that to me.
8 MR. NYHAN: I wanted to check with you before
9 we did anything on that. I take it you denied my
10 request to do that at this point?
11 THE COURT: At this time.
12 MR. NYHAN: Again --
13 THE COURT: Because I think -- I don't think
14 it's a part of what was designated by the plaintiff, and
15 you were reading your portions to the deposition in
16 answer to what they read. So, that does not mean I
17 would not consider it. Whether I would allow it or not
18 is another matter.
19 MR. NYHAN: We believe that we are entitled
20 to show if the witness were here live, we would be able
21 to bring out on cross-examination that he had signed
22 this agreement. We think it's appropriate to do so at
23 this point, and if you would, Your Honor denies that,
24 again, I would renew my motion for mistrial.
25 THE COURT: All right.

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1 (Side-bar conference concluded; proceedings
2 resumed before the jury panel.)
3 THE COURT: Ladies and gentlemen, the next
4 witness is going to take a long time to testify, so what
5 we intend to do is have Mr. Wilner call the next witness
6 in just a few minutes -- not quite yet, Mr. Wilner --
7 and maybe go somewhere between five and 5:30.
8 Mr. Wilner will get at a point where he can stop in the
9 testimony, and that witness will be back tomorrow.
10 Also, I think it's probably a good time right
11 now to tell you that as far as the jury is concerned,
12 the trial will not -- when we recess Friday, we will
13 resume Tuesday morning, since Monday is a holiday. And
14 the attorneys and I may be working, but we don't expect
15 you to be here Monday; and I don't know if you made
16 plans or anything, but there's not going to be a problem
17 with that with us expecting you to be here Monday.
18 All right. Call your next witness, please,
19 Mr. Wilner.

20 MR. WILNER: Thank you, Your Honor. The
21 Maddox family calls Dr. Allan Feingold.
22 THE COURT: All right. Dr. Feingold, if you
23 can maneuver through there, if you will come on up, and
24 have a seat on the witness stand, and I will swear you
25 once you are seated, sir. Good afternoon.

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1 THE WITNESS: Good afternoon, sir.
2 THE COURT: Would you have a seat, please,
3 and raise your right hand.
4 Do you swear that the testimony you are about
5 to give will be the truth, the whole truth and nothing
6 but the truth?
7 THE WITNESS: I do.
8 THE COURT: Thank you, sir. Mr. Wilner, you
9 may proceed.

10 MR. WILNER: May it please the Court.
11 I. ALLAN FEINGOLD,
12 having been produced and first duly sworn as a witness,
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WILNER:

16 Q Dr. Feingold, good afternoon.

17 A Good afternoon.

18 Q Where have you been today?

19 A Waiting in your office.

20 Q Where did you come from?

21 A Miami.

22 Q Tell us what your life is like in Miami.

23 A It's wonderful. It's busy.

24 Q What do you do?

25 A Well, I am a father of three children, a
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1 husband, member of a family. And professionally I am a
2 lung specialist. I take care of people who have various
3 diseases of the lungs, all kinds of different diseases
4 of the lungs, but a lot of lung cancer, chronic
5 bronchitis, emphysema, and some things that are less
6 serious like asthma and pneumonia, things of that
7 nature.

8 Q Where do you take care of people?

9 A Well, my office is in the -- in a hospital.
10 It's in a big community hospital which is South Miami
11 Hospital, part of the Baptist health system which is a
12 four-hospital system, the largest not-for-profit
13 hospital system in South Florida.

14 I am the chief of the division of pulmonary
15 medicine at South Miami Hospital, so I run the
16 department, and I take care of patients, and I help to
17 coordinate activities of the pulmonary department with
18 the other departments in the hospital.

19 Q Push the mike away or lean back, because they
20 are real hypersensitive to the little p's and things.
21 Thanks.

22 All right. So you tell the jury, please, what
23 kinds of responsibilities you have as chief of the
24 pulmonary department in South Miami Hospital systems.

25 A Well, South Miami Hospital is a
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1 community-based hospital. It's not an academic center;
2 it's not a place where research is done. It's a place
3 where a lot of patients are taken care of.

4 So my responsibilities in that division are to
5 make sure that the quality of care that's given to
6 individual human beings in our institution is the best
7 it can be; to run the place the way it's supposed to be
8 run; to make sure that the quality of the people who
9 work there is high; that the equipment that's used is in
10 good working order; that the results that we give to
11 other doctors from tests that we do, special tests on
12 the lung function of human beings is perfect and of a
13 most accurate amount -- degree that we can.

14 So those are the kind of technical things that

15 I am responsible for.
16 I am responsible to make sure that the people
17 that work in my department and the physicians who are
18 associated with the division of pulmonary medicine
19 function well in the environment of the hospital. You
20 know, a hospital is like a big city, and it's a living
21 thing, if you wish. That's not always easy. There are
22 all kinds of people to work with.

23 Q Do you treat patients?

24 A Every day.

25 Q When these patients come into the hospital,
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1 how do they come to see you?

2 A Well, they come to see me in various ways.
3 First of all, I have been there for 16 years, so I have
4 a big practice. I have got thousands of people that
5 come -- that have seen me over the years, and some of
6 them come back for various reasons. Most importantly,
7 patients are sent to me by other doctors, and since I am
8 a subspecialist really, it's mostly other specialists
9 that send patients to me. Some family practitioners,
10 but also cardiac specialists, for example, or kidney
11 specialists, or surgeons will ask me to see one of their
12 patients before and after an operation to help with the
13 management of a patient.

14 Patients see me both on an outpatient basis,
15 meaning they come to my office which is in the hospital
16 for me to examine them and look at their x-rays and give
17 them an answer as to what's wrong with them and tell
18 their doctors what I think should be done. And they
19 come to me because they have no choice in the hospital,
20 meaning they are sick in bed. Sometimes just on the
21 floor; sometimes in the intensive care unit; sometimes I
22 respond because they are having a cardiac arrest or some
23 other disaster or that kind of thing.

24 Q Do you have partners who you practice with at
25 the hospital?

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1 A I have a partner, thank God. He is watching
2 the shop at the moment. And, also, there are multiple
3 other pulmonary doctors who are associated with our
4 division of pulmonary medicine.

5 Q Do you -- are you -- do you have like rounds
6 or rotations at different times where you are
7 responsible for staying on?

8 A Right. As a matter of fact, I have a lot of
9 personal duty time. The -- there's only one other
10 partner. So, in fact, we work 12 days in a row and then
11 take two days off, which is exactly what we do.

12 Q Do you ever have to come in in the middle of
13 the night?

14 A When you are tucked in bed, yes. While
15 everybody else is sleeping I'm in the hospital often.
16 Not every day, but maybe two times a week or four or
17 five times a month, something like that. We do have
18 junior doctors who work in the middle of the night, but
19 they oftentimes need us to come and give an opinion as

20 to what's going on.

21 Q Do you have the ultimate responsibility for
22 the pulmonary status of everyone in the hospital who
23 is -- when you are on?

24 A For the patients who are in my practice, yes;
25 and for the patients who are served by the technicians
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1 and therapists under my direct supervision, yes,
2 absolutely.

3 Q Do you have anyone above you to ask if things
4 get bad?

5 A Pulmonary-wise?

6 Q Yeah.

7 A No, I am afraid the buck stops with me which
8 is sometimes scary. But, you know, we live in a
9 connected world, and so I spend a great deal of time on
10 the computer. We have a tremendous access today to
11 national and international experts of every kind for
12 difficult problems in lung medicine, or any kind of
13 medicine. So, we resort to conferencing and getting
14 information from all kinds of people. So, if people
15 come to me with a question that I can't answer, I find
16 the answer.

17 Q Do you -- do you keep track of how many hours
18 you spend in your profession?

19 A Not really. I actually -- no. As a matter
20 of fact, I really more -- I have tried to estimate it.
21 At times in the past people have asked me, but it's
22 really difficult. I mean, the fact is that I work,
23 let's say, for 12 days in a row. I am on that whole
24 time, and 2:00 in the morning I get a phone call. I
25 mean, I get many, many phone calls. I am working. At
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1 2:00 in the morning I am working. I have to be awake
2 and make a decision.

3 That's work. I spend a lot of time studying
4 every single day. That's work. Most people would call
5 it work. I -- actually though, what I track is how much
6 time I spend with my children. I don't really track how
7 much time I spend with work because work is all the
8 time.

9 Q Do you know what academic medicine is?

10 A Of course.

11 Q What is it?

12 A It's the kind of medicine that goes on in
13 university teaching hospitals, and it's the kind of
14 medicine that supports research, the professorial
15 production of research and of new doctors.

16 Q Do you respect that type of medicine?

17 A Love it. Respect it.

18 Q Do you practice it?

19 A No. That's not what I am. I was in that
20 arena for many years as a student and as a resident and
21 as a fellow. Did research. I mean, I was there, and
22 then when I was -- when I -- after my training in
23 Montreal, Canada, which is where I am originally from, I
24 continued to participate in the academic center for a

25 while. But then I was recruited to come to Miami in
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1 1982, and I have been at South Miami Hospital which is a
2 community hospital, not an academic hospital, ever
3 since.

4 Q Tell us where you grew up and went to medical
5 school, if you would?

6 A Well, I grew up in Montreal -- Montreal,
7 Quebec, Canada, and I went to college there. I went to
8 high school and college in Montreal. From Montreal I
9 want to McMaster University Medical Center in Hamilton,
10 Ontario. That was after my Bachelor of Arts degree.
11 And I did my medical school there at McMaster, which was
12 a wonderful place with inspiring professors.

13 After McMaster Medical School I returned to
14 the McGill University teaching system. I went to McGill
15 as undergraduate. And I had the good fortune to be
16 accepted as an intern at the Royal Victoria Hospital
17 which was in the 1970s, probably still today Canada's
18 premier medical institution. So I did my internship and
19 residency at the Royal Victoria Hospital.

20 Q In what city?

21 A In Montreal.

22 Q Grew up there?

23 A Yeah.

24 Q And you were a Canadian citizen by birth?

25 A No, I was born in Tel Aviv, Israel. My
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1 parents escaped from wartime Germany and Poland. Met in
2 Israel. I was born in Israel, and my parents, then
3 weary from wars and fighting, and my father was a
4 decorated hero --

5 MR. NYHAN: Your Honor.

6 THE COURT: Are you objecting? I'll sustain
7 the objection, Mr. Wilner.

8 A Anyway, they left and went to Canada. So --
9 and then I grew up in Canada. My parents took me to
10 Canada when I was a baby. Grew up in Montreal.

11 Q As a Canadian citizen?

12 A I became a Canadian citizen.

13 Q And went to school -- public school in Canada
14 and on through medical school?

15 A Correct.

16 Q What were you interested in in medical
17 school?

18 A Well, I was interested in a few things. I --
19 in medical school I was influenced by pulmonary medicine
20 in general. My medical school --

21 Q Pulmonary means what?

22 A Lung medicine.

23 Q Okay.

24 A And my medical school was in Hamilton,
25 Ontario. Hamilton is an industrial town with big

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1 factories, steel companies -- Steel Company of Canada,
2 that kind of thing. And I became more and more
3 interested in the diseases of lung that are -- that
4 occur in people who work, work in factories, mines,
5 things of that nature. So, I became increasingly
6 interested in occupational -- it was called occupational
7 lung disease.

8 So with that interest I left Hamilton, went
9 back to Montreal to the Royal Victoria Hospital, did
10 internal medicine and then pulmonary or lung medicine.

11 Q Did you study lung medicine as kind of a
12 specialty when you were in the -- in the years following
13 medical school when you were still in your training?

14 A Yes. Well, I graduated medical school in
15 1975. Now, at that point I was a doctor. That was -- I
16 graduated MD degree. But after you graduate with an MD,
17 you still have a lot of training and learning you have
18 to do. So with the MD degree I went into internship.
19 Everybody does. In internship I did internal medicine
20 first and then I did pulmonary medicine. Pulmonary
21 medicine is a subspecialty of internal medicine. It's
22 part of internal medicine.

23 Q Did you study under renowned physicians at
24 the Royal Victoria Hospital?

25 A I had the privilege, yes.

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1 Q And did you decide to dedicate your
2 professional life to the study of the diseases of the
3 lung and related matters?

4 A I did. Influenced I think largely by Peter
5 Parady who was the programs professor and chief of
6 pulmonary medicine at the Royal Victoria Hospital. I
7 decided to pursue that, yes.

8 Q So, where did this quest take you?

9 A Well, it took me to years of further study at
10 the Royal Victoria Hospital, at the Montreal Chest
11 Hospital Center, at the Montreal General Hospital, at
12 various other pulmonary hospitals and sanitorium in
13 Montreal and outside of Montreal. And I did years of
14 additional study in the -- and work. Eventually, I
15 became board-certified, which is a natural course of
16 things for people who do specialty medicine.

17 Q And it means what?

18 A Well, board certification means that you have
19 taken a course of study that's designated by a board.
20 Now there are lots of boards. In the United States
21 there's a board of -- American Board of Internal
22 Medicine, for example, and I am board-certified by the
23 American Board of Internal Medicine. That means that
24 the ABIM says, look, if a doctor wants to become
25 board-certified, he has got to have -- or she has got to

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1 have studied these things, spent this number of years,
2 typically five to seven years after medical school. And
3 then the doctor is going to have recommendations from
4 his or her professors, and then the doctor can sit for
5 special examinations.

6 Q That's here or in Canada?
7 A Well, I did both. I did Canada, I did
8 Quebec, I did -- because I was just separate, and I did
9 the United States.
10 Q Do you need to do this to practice medicine?
11 A No. No. You don't have to do it to
12 practice, but you need to do it for yourself to prove to
13 yourself that you have mastered the specialty, and you
14 have to do it oftentimes for billing purposes and other
15 mundane things like that.
16 I became very involved with board
17 certification, so I took five board certifications, and
18 I mean, I took exams for years and years.
19 Q Well, did you pass the exam?
20 A Yeah.
21 Q So you were then -- you moved to the United
22 States?
23 A Right. Actually, I took a board examinations
24 in internal medicine and pulmonary medicine in Canada.
25 I mean, American board exams were given in Canada. So,
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1 I took those exams, and I came -- in 1982 I was asked to
2 join the staff of the -- of South Miami Hospital.
3 Q Why Miami?
4 A Well, I wanted to move. I -- my wife and I
5 wanted to leave Montreal. We wanted to move to the
6 United States, and my wife Esther's parents and brother
7 and sister had already moved to Miami, so it was natural
8 for us.
9 Q Esther is?
10 A My wife.
11 Q So she had family in Miami?
12 A Correct.
13 Q And so you got a position at the South Miami
14 Hospital?
15 A I did.
16 Q Which is a -- how is it -- is it a public
17 hospital or not-for-profit or private -- how does it
18 work?
19 A It's a big place. It's a large
20 not-for-profit community hospital. It has technically
21 speaking about 500 beds. It's part of a 2,000-odd bed
22 system which is in a small geographic area.
23 Q And they were able to offer you a position in
24 the department of pulmonary medicine?
25 A Yeah, they wanted me.
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1 Q And did you work at that time under someone
2 who was at that time the head of the department?
3 A I did. And, unfortunately, he sickened while
4 I was there, and he died.
5 Q And what happened in the years following that
6 with your position in the hospital?
7 A Well, as a matter of fact, I worked with him,
8 and eventually it was decided that I should take over.
9 This was a decision of the hospital and of the board of
10 the hospital, and I was selected to be the chief after

11 the previous man died.

12 Q Now, having passed these five board
13 examinations, did you -- is it your -- or isn't it your
14 philosophy of your life or of your profession to
15 continue to study?

16 A Well, medicine -- for most doctors medicine
17 is very much about studying. For me personally medicine
18 has a lot to do with studying. Studying is the pursuit
19 of knowledge and truth and expertise, and it's not just
20 for itself. You know, it's not just to know. It's so
21 that when I go into the office the next morning, I will
22 have the answer for the patient.

23 Now, obviously, we don't know a lot of things.
24 A lot of things that medicine knows today that we didn't
25 know ten years ago, tremendous, but there's still huge

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1 things that we don't know. So it's a constant process
2 of learning. Now, today it's a lot easier to learn than
3 it was ten years ago, because we don't have to read
4 medical journals on paper anymore. We can read them on
5 a computer screen. We can jump from one to another. I
6 have access to every library in the world practically
7 through my computer.

8 (Change of reporters, 4:35 p.m.)

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1 Q Well, you have reached a position in the
2 hospital, or whatever position you have reached, do
3 you have to keep studying like this all the time?

4 A Well, I think so. I think so. I think
5 that there's a huge duty, you know. First of all,
6 there can be no greater duty than to take care of

7 sick people for me. So I've got to know what I'm
8 doing. And knowing the right answer from a year ago
9 is not enough, obviously.

10 The other issue is that there are special
11 projects. I've become involved in special projects,
12 a whole bunch of them. I'm on the board of
13 governors of the hospital. I was eventually chosen
14 -- I was chosen to be a chairman of the department
15 of medicine. I was chairman of medicine for years.
16 I was --

17 Q How is that different from chairman of the
18 department of pulmonary medicine?

19 A Well, you see, pulmonary medicine is a
20 part of internal medicine. Pulmonary medicine is
21 that portion where doctors take care of the internal
22 diseases of the lungs, diseases like asthma or lung
23 cancer or pneumonia and so on.

24 There are other parts of internal
25 medicine, like cardiology. That doesn't mean

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1 surgery. That means the cardiologists make a
2 diagnosis and figure out what's wrong with people's
3 hearts. Sometimes a cardiologist, sometimes a
4 pulmonary doctor will refer a patient for surgery.

5 But, anyway, internal medicine is
6 different than surgery. The broad range of internal
7 medicine includes all these different specialties
8 like pulmonary, like cardiology, like kidney, like
9 endocrine, and all of those, traditionally anyway,

10 have been lumped together in a big department. So I
11 was a chairman of that department for a while. For
12 three years.

13 Q Did you have cardiologists and
14 endocrinologists and others under, so to speak,
15 under you?

16 A Well, they weren't under me exactly. But
17 I guess they elected me so I guess they chose me for
18 the reason I was supposed to provide leadership.
19 And I tried to do that. And then I was elected to
20 be a member of the board of governors of the
21 hospital for somewhat different reasons. You know,
22 being on the board of governors gives you a whole
23 different set of challenges. So there are other
24 things to study and learn.

25 And then besides that, I became involved

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1 in other projects which require me to study and
2 devote myself to learning about issues. For many
3 years I've studied about occupational lung disease
4 of different kinds. I said I started in Hamilton.
5 I continued in the United States. I took special
6 board exams again in the United States. I wasn't
7 satisfied, took more exams. I became a certified
8 NIOSH certifier.

9 Q I'll ask about that in a second. So you
10 -- take me back to occupational medicine in Canada.
11 You were familiar with occupational lung diseases?

12 A Well, yes. See, Hamilton, as I mentioned
13 is a steel town. Quebec, where I spent most of my
14 life before coming to Miami, Quebec is a heavy
15 industrial province where there's mining and
16 factories and so on. In fact, a lot of mining.

17 And patients who we would see in the
18 hospital were oftentimes those men and some women
19 who had been exposed to mining situations. Lung
20 specialists had to be involved with that because
21 some of these patients developed diseases of the
22 lung. For example, asbestosis. Quebec, Canada, the
23 province of Quebec, is the source of almost all of
24 the asbestos that is ever used in the United States.

25 Q We'll talk in great detail about this in

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1 the future or as we go on, but did you acquire
2 special expertise in industrial diseases such as
3 asbestos-related disease?

4 A I did.

5 Q And how does -- in just one sentence, how
6 does, in terms of being a pulmonologist and looking
7 at all the diseases of the lungs and how they affect
8 people, how does -- how do the astestos-related
9 diseases compare with the cigarette-related
10 diseases, et cetera?

11 A Well, they have a special similarity, and
12 that is the diseases are caused by something from
13 the outside. They're exogenous. They're from an
14 outside factor.

15 Q Which is more significant for the health
16 of the country?

17 A From a national perspective, cigarette
18 smoking induced disease is tremendously more
19 important from the individual human perspective.
20 Patients who suffer from diseases caused by
21 asbestos, of course, are suffering bad. Both things
22 are bad, but one is enormously more important than
23 the other in terms of numbers.

24 Q Are you pledged to fight both -- all kinds
25 of diseases as part of your profession?

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1 A That was my oath.

2 Q Now, tell me then, did you acquire while
3 you were in Canada some special expertise in looking
4 at chest x-rays in occupational disease?

5 A I did.

6 Q And what is that called?

7 A Well, in a laboratory hospital and more
8 importantly in the Montreal Chest Hospital Center,
9 there was a great deal of interest and concentration
10 on diseases caused by not just asbestos but coal
11 dust and silica and a wide variety of other things.
12 So that's really where my specialized training
13 started.

14 We did a tremendous amount of x-ray
15 analysis work there. And I had the privilege of
16 working under a renowned radiology specialist. And

17 I came here to the United States -- when I came to
18 the United States, I took the opportunity to pursue
19 study in the NIOSH program.

20 Q NIOSH being?

21 A The National Institute for Occupational
22 Safety and Health.

23 Q And did you do special study to pass
24 certain tests of the NIOSH?

25 A Yes. There's a special test that NIOSH

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1 administers according to U.S. law. There's a
2 federal law pertaining to this, Federal Mine Safety
3 and Health Act. And NIOSH administers a program to
4 identify physicians in the United States who are
5 specially trained and able to read x-rays and rate
6 them for diseases caused by occupation.

7 Q And you brought this expertise with you
8 when you came to South Miami Hospital in 1982?

9 A I brought some of it with me and then I
10 acquired more while I was there.

11 Q And when did we meet?

12 A We met in 19- -- I think we met in 1982,
13 '82 or '83. I believe it was '82, you and I.

14 Q Time flies. Why did we meet?

15 A You came -- I remember the day. You came
16 with another attorney to see our laboratory, to tour
17 our laboratory, pulmonary function laboratory, and
18 to discuss with me the possibility that I would
19 contribute to medical legal evaluations of patients

20 who had been exposed to asbestos.

21 Q Now, why was I interested in that?

22 A Well, I know you were defending some
23 asbestos companies, companies that had produced
24 asbestos in the past.

25 Q And why did I want to talk to you? I

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1 mean, don't read my mind, but what was the substance
2 of the meeting?

3 A The substance was whether or not I could
4 see and evaluate patients and examine them and
5 interpret their chest x-rays and give reports and
6 then subsequently, if necessary, give testimony
7 pertaining to what was wrong with people who had
8 been exposed to asbestos.

9 Q Was that something that you had, based on
10 your training in Canada and in the U.S., felt that
11 you could contribute?

12 A Yes.

13 Q Did you understand that it might involve
14 testimony in court?

15 A Well, I didn't really -- I didn't
16 understand it completely when it began but, yes, I
17 knew that there had to be resolution of legal
18 matters and that doctors were needed to provide
19 testimony in courtrooms so that juries could make
20 decisions.

21 Q Were you -- how did you feel about the

22 necessity of coming to trial in -- let's just talk
23 about the 1980s.

24 MR. NYHAN: Your Honor, may we be heard?

25 (Side-bar conference held outside the

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1 hearing of the jury)

2 MR. NYHAN: I would prefer not to have to
3 make a series of objections as to self-serving
4 statements. And I hope we're not going to have a
5 repeat of what we had before.

6 MR. WILNER: I don't know. First, I don't
7 mean to get into a shouting match with my colleague
8 here, but a repeat of what we had before, I don't
9 know what he's talking about.

10 THE COURT: I think he's talking about
11 Dr. Whelan. You weren't here, but I sustained the
12 objection to Dr. Whelan's testimony that she was
13 here as a public service. I think it's self-
14 serving, Mr. Wilner. I don't think the reasons that
15 he's here, whether he's being paid to be here or
16 he's volunteering to be here as a public service or
17 whatever his motives for testifying, are important
18 to the issues in this trial.

19 MR WILNER: No, I wasn't going into that
20 until the door gets open. In other words, If they
21 ask --

22 THE COURT: I understand that. That's
23 fine if he wants to say nothing, that's fine. But
24 what we are attempting to avoid is an unnecessarily

25 self-serving response that I'm here as a public

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1 service, in effect, however you couch it, you know.

2 And it appeared that that's what he was about to

3 say.

4 MR. WILNER: I wasn't going there at all,
5 but I did intend to ask him whether he's being paid.

6 I take it that's not --

7 THE COURT: I don't have a problem with
8 that. If Mr. Nyhan wants to object, that's fine.
9 But I'm talking about his motives for coming here.
10 And he's already said he thinks doctors should
11 testify, that was fairly neutral. They get paid for
12 testifying normally, but, I mean --

13 MR. WILNER: That's right.

14 THE COURT: But let's say he's here as a
15 public service. I'm not going to allow that.

16 MR. WILNER: That isn't where I was going.

17 (Side-bar conference concluded;
18 proceedings resumed before the jury).

19 Q Dr. Feingold, let's go back again to the
20 '80s. Did you start -- did you set up your
21 laboratory or part of your laboratory so that it
22 would -- so that you could do some type of
23 evaluations on people who had legal claims?

24 A Yes. Pulmonary function laboratories are
25 special places where tests are done on lung

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1 function. And the reason tests are done on lung
2 function is typically to help doctors make a
3 diagnosis.

4 Now, some of the diagnoses that are
5 important in legal cases are diagnoses of diseases
6 such as asbestosis or coal workers pneumoconiosis
7 and other illnesses. For example, individuals who
8 have been injured in a fire or explosion have
9 certain kind of diagnoses.

10 And the point is to have a laboratory
11 that's capable of providing reliable diagnostic
12 information. So I felt in the '80s that our
13 laboratory was ideally suited for that. It does, in
14 any way, for sick patients for other reasons. And
15 our laboratory evolved and became much bigger, much
16 more successful, and much busier because of seeing
17 patients who were involved in medical-legal cases.

18 Q Was the hospital that you worked with
19 fully understanding of this project that you were
20 undertaking?

21 A Yes. I mean, it was well discussed and
22 explained and understood and certainly it was
23 supported.

24 Q Was there any rule inside the hospital
25 against permitting physicians to enter the legal

1 arena and give their testimony?

2 A No, not at all. I mean, I think that
3 providing --

4 MR. NYHAN: Your Honor, I think we're
5 again touching on the same area.

6 THE COURT: I'll sustain the objection,
7 Mr. Wilner.

8 MR. WILNER: All right.

9 Q Dr. Feingold, were you asked from time to
10 time to provide testimony in court about a patient
11 that you had either seen or whose records you had
12 evaluated?

13 A Yes, certainly.

14 Q And did you -- and I'll get to -- I'll
15 move on that in a minute, but did you as part of the
16 initial process of gearing up, so to speak, and
17 setting up the laboratory, what kind of research was
18 necessary to do that?

19 A Well, at that time it was mostly medical
20 literature that had to be reviewed and assessed in
21 great detail. Medical literature means medical
22 journal articles that have to be read and
23 interpreted and categorized and understood so that
24 we could make sure that the laboratory would do what
25 had to be done to give definitive answers.

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1 The side benefit was that all the other
2 patients who used the laboratory benefited because

3 of the increased expertise. Beyond just laboratory,
4 of course, there was expertise that had to be
5 acquired in the radiology department, x-ray
6 department, and my own personal expertise.

7 Q So how much studying, so to speak, did you
8 do in connection with the asbestos project?

9 A Oh, over the years, I don't know. It's so
10 much. Huge amount of study. It's even hard to
11 calculate how many hours.

12 Q Not hours, but how did you do it? What
13 did you do?

14 A Well, in terms of asbestos and other
15 occupational lung diseases which we pursued, what
16 happened was I began to take special courses of
17 study. I became a NIOSH certified B reader. I
18 attended appropriate conferences. We purchased all
19 the textbooks, started to read literally thousands
20 of articles, started to categorize and classify
21 these articles, created our own library,
22 specifically designed for this, and also muster
23 resources. Worked with radiologists and
24 pathologists and other doctors so that we could
25 provide this kind of service.

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1 Q Now, during the course -- well, during the
2 course of this project and even before, had you had
3 training in or exposure to cigarette -- the diseases
4 caused by cigarette?

5 A The diseases caused by cigarettes are the

6 most important diseases that lung specialists take
7 care of in Canada and the United States, so if you
8 become a lung specialist, you have to study diseases
9 caused by cigarette smoking.

10 Q When is the first time that you got
11 acquainted with cigarette-related diseases in
12 training, in pulmonary training?

13 A The day you walk in the hospital.

14 Q How is that? What do you see?

15 A You see people who are suffering and dying
16 of lung cancer or chronic bronchitis, emphysema, and
17 a host of other illnesses.

18 Q Was that true when you went into your
19 training in Canada?

20 A Absolutely.

21 Q And coming down to the South Miami
22 Hospital, were you exposed to the same kind of
23 situation?

24 A Yes. The most devastating illnesses that
25 I take care of on a routine basis are caused by

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1 cigarette smoking, primarily lung cancer and
2 emphysema. In Florida this year about 13,000 people
3 will die of lung cancer. Almost all of those are
4 caused by cigarette smoking. So every single
5 pulmonary doctor who works in the State of Florida
6 has that burden practically every single day.

7 Q Now, during the asbestos project, did you

8 begin or did you continue with a special interest in
9 cigarette medicine and cigarette-related diseases?

10 A Well, it turns out that they're
11 intricately related. Asbestos diseases, diseases
12 induced by asbestos exposure and diseases induced by
13 cigarette smoking are related. And, in fact, in
14 patients who have asbestosis, which is a special
15 disease caused by a lot of asbestos inhalation,
16 smoking cigarettes very significantly increases the
17 risk of lung cancer.

18 It's a combination. It's interaction
19 between asbestosis and cigarette smoking which is
20 particularly terrible. For asbestos workers who
21 don't smoke, even if they developed asbestosis,
22 there's practically no lung cancer. But for
23 asbestos workers who have asbestosis and smoke,
24 there's a terrible incidence of lung cancer. So
25 they're interrelated.

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1 Q Because we've been talking about asbestos
2 and the asbestos project, fast forward us a little
3 bit. Does asbestos have anything to do with this
4 case?

5 A No, not with this case.

6 Q I mean, is there any conceivable
7 possibility that Mr. Maddox's disease was in any way
8 related to asbestos?

9 A Mr. Maddox's disease was not related to
10 asbestos. He may have had some limited occupational

11 asbestos exposure. I don't think he -- he probably
12 had none, as a matter of fact, but he might have
13 arguably had some limited. However, x-rays,
14 particularly CT scans, which are a special kind of
15 x-ray, demonstrated that there was no sign of
16 asbestos exposure.

17 Q Was this even a serious issue with you
18 when you evaluated the case?

19 A Every issue is serious with me. I'm a
20 very serious type of person, you know. Yes, it was
21 a serious issue. I had to think about it, but
22 clearly the patient had no evidence of asbestosis.
23 And clearly individuals who have much greater, who
24 have real asbestos exposure or work with asbestos
25 but who didn't get asbestosis have a risk of lung

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1 cancer which is basically the risk of cigarette
2 smoking.

3 Q We'll talk about the details in a bit, but
4 how -- did you then in your study, in your course of
5 study both for the asbestos project and for your
6 position at the hospital, get more and more
7 interested in cigarette medicine?

8 A It was an evolutionary process. It became
9 clear to me over the years that the people who I was
10 seeing who -- and there were thousands of them --
11 who had been exposed to asbestos had suffered a
12 tremendously dangerous double jeopardy situation

13 where on the one hand they had been exposed to
14 asbestos and had --

15 MR. NYHAN: Your Honor, objection.

16 (Side-bar conference held outside the
17 hearing of the jury)

18 MR. NYHAN: Now that he's established that
19 asbestos isn't relevant, I think it's improper for
20 him to try to qualify him as an asbestos expert in
21 this trial. This isn't about asbestos, so let's not
22 hear any more about it.

23 MR. WILNER: I don't know what kind of
24 objection that is.

25 MR. NYHAN: Relevance.

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1 MR. WILNER: Well, it was the defense who
2 brought up asbestos in this case, not the plaintiff.
3 They brought it up by saying he was around asbestos
4 at one point. They brought it up but, anyway, I'm
5 not qualifying him as an asbestos expert, although
6 he is, and I'm entitled to deal with all the
7 confounding variables that may come up. And he is
8 an asbestos -- he is an expert, and I don't care
9 whether they contend. I'm entitled to disprove
10 whether asbestos is an issue just like I could
11 disprove that something else was an issue if I
12 choose to.

13 What if I think that it's important that
14 he not be -- we not suggest that radiation is a
15 cause. Well, maybe I need to go into that. I don't

16 know. I don't understand the issue.

17 THE COURT: Hasn't he said asbestos is not
18 an issue and that he was not exposed to it?

19 MR. WILNER: Of course. Now he's
20 objecting that I can't qualify him to say that.

21 MR. NYHAN: He's already said it and I
22 didn't object to his saying it. I just know --
23 we're moving into irrelevant areas, Your Honor.

24 THE COURT: I'll let him go into a little
25 bit of his background to qualify him to say that

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1 but, I mean, let's don't spend a whole of time on
2 this.

3 MR. WILNER: Can I just say along with --
4 I think you taught me one thing I still use all the
5 time. Ninety-five percent of what lawyers think is
6 going to happen is not going to happen. And I'm
7 kind of at a loss to know how Mr. Nyhan knows
8 exactly, supposedly what my questions will lead to,
9 but they're not.

10 THE COURT: Well, I don't think he's so
11 much worried about you as the witness, because you
12 didn't experience yesterday with Dr. Whelan. And no
13 matter what questions Mr. Nyhan asked, Dr. Whelan
14 answered according to her own agenda, and he is
15 obviously concerned that Dr. Feingold will.

16 And I agree with you, it's probably not
17 going to come to fruition, but Dr. Whelan wanted to

18 let the jury know that she was here as a public
19 service. And I kept trying to keep her from doing
20 that when Mr. Nyhan objected. An that's, I think,
21 the concern for both of us. I finally instructed
22 her in front of the jury three or four times, but it
23 still didn't make any difference. And I guess we're
24 both a little gun-shy, Mr. Nyhan and me.

25 MR. WILNER: Okay.

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1 THE COURT: So that's all we're talking
2 about. And so he has made the statement that it has
3 nothing to do with asbestos and that he's positive
4 it has nothing to do with asbestos. I'll let you go
5 into a little bit of his background treating
6 asbestos patients, if he did, and examining them.

7 MR. WILNER: I wasn't intending to.

8 THE COURT: Okay, thank you

9 (Side-bar conference concluded;
10 proceedings resumed before the jury)

11 Q To save time without going into the
12 different diseases, did you study, did you begin at
13 one point in your life to make a special study of
14 cigarette medicine?

15 A Yes.

16 Q When? It may be impossible to answer,
17 but...

18 A I think the process has been going on with
19 me for more than 20 years, certainly for the last 15
20 years intensely, and involved with other kinds of

21 information about cigarette smoking and disease for
22 the last, say, five years.

23 Q Did you have occasion to make a special
24 study of cigarette medicine with me?

25 A Oh, yes.

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1 Q Why?

2 A Because initially because of the impact of
3 cigarette smoking on asbestos workers, and
4 subsequently because of what we learned about the
5 activities of tobacco industry.

6 Q Now, in connection with your work on
7 asbestos with me, did you and I collaborate on a
8 book?

9 A Yes, we did.

10 Q And is this the book?

11 A It is.

12 Q And the title is what?

13 A "Asbestos Medicine on Trial."

14 Q By Norwood S. Wilner and Allan Feingold?

15 A Correct.

16 Q That's you and that's me?

17 A Correct.

18 Q And this was published?

19 A '96, '5.

20 Q And the purpose of this book was what?

21 A The purpose was to state clearly for
22 physicians, like myself involved with occupational

23 lung disease, and for attorneys like you and for
24 judges who will need to make decisions and for
25 others involved in this kind of difficult task of

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1 deciding what had caused different people's
2 diseases, stating the issues, explaining the basis
3 for making decisions, putting forth the science,
4 doing some analysis of what the problems were.

5 Q And what kind of subjects, without -- we
6 won't read from it or anything not in detail, just
7 what kind of issues are covered?

8 A Issues of causation, of diagnosis, of
9 cause and effect, of pulmonary function testing, of
10 different specific diseases that are related, and
11 subsequent volumes not finished yet, cancer and
12 mesothelioma and other illnesses.

13 Q Is there a chapter on cigarette disease in
14 this book?

15 A There is as it pertains to asbestos
16 diagnosis mostly, because the section on cancer is
17 yet to come.

18 Q And did that require research?

19 A Of course.

20 Q And did you at some time during this
21 process begin to research not only the published
22 literature but documents that might have come that
23 were unpublished?

24 A Yes. I did.

25 Q And how did you begin to acquire documents

1 that had not been published in the medical
2 literature but which had been authored by the
3 cigarette industry?

4 A Well, let me just reach for one thing here
5 in my briefcase if I can find it. On July 19,
6 1995 --

7 MR. NYHAN: Your Honor, may we be heard?

8 (Side-bar conference held outside the
9 hearing of the jury)

10 MR. NYHAN: The doctor has just identified
11 what I expect is going to be an an article published
12 in July 19, 1995 in the Journal of the American
13 Medical Association that reports on a number of
14 different documents stolen from Brown & Williamson
15 Tobacco Company by a paralegal who worked for a law
16 firm. And they raise privilege issues which I
17 understood you were going to resolve before we get
18 into this. So apparently we haven't resolved this,
19 so we object.

20 THE COURT: Are these Brown & Williamson
21 documents?

22 MR. NYHAN: Yes.

23 MR. WILNER: Your Honor, he's not going to
24 read from any documents before Your Honor rules on
25 them, nor is he going to read the contents.

1 THE COURT: What's he going to say about
2 the articles?

3 MR. WILNER: He's going to say it was the
4 reason that he began to do more intensive research
5 on the issue of cigarettes and disease. He's going
6 to -- we're going to describe it in general terms,
7 the fact that there are documents we've already
8 established. Perfectly reasonable to talk about the
9 fact that there are documents.

10 MR. NYHAN: We believe Your Honor should
11 rule on the privilege issues so that we're all
12 clear, and we don't have unnecessary problems before
13 we get into this.

14 MR. WILNER: Wait a minute. Of these
15 documents, there aren't five percent that they're
16 asserting a privilege claim. So even if we forget
17 about the privilege claim, even if we throw out
18 tomorrow all the privilege documents --

19 THE COURT: Is he going to talk about a
20 particular document?

21 MR. WILNER: Right this second?

22 THE COURT: Yes.

23 MR. WILNER: No.

24 THE COURT: Just read an article and based
25 on that article he decided to get involved?

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1 MR. WILNER: Yes. He's going to talk

2 about the fact -- and, again, I don't know exactly,
3 but I'm going to try and get -- again, this is like
4 the parade of homes. I think I can ask questions
5 that are permissible. We're not going to violate
6 any privilege. I think he can say that at the time
7 that he -- that this article, what it describes in
8 general, is not going to violate any privilege until
9 we have a hearing. But 90 percent of these things
10 aren't privileged anyway.

11 THE COURT: I'll take your representation
12 on that, Mr. Wilner.

13 MR. WILNER: Okay.

14 (Side-bar conference concluded;
15 proceedings resumed before the jury).

16 Q Dr. Feingold, we were talking about an
17 article you read in the Journal of the American
18 Medical Association?

19 A Actually I was about to say that on
20 July 19, 1995, the Journal of the American Medical
21 Association published what they called several
22 highly unusual articles.

23 Q All right.

24 A In fact, the whole issue.

25 Q Let me tell you right now I'll ask you not

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1 to tell us about the specifics of any documents that
2 are described in those articles, but just tell us in
3 general why that was important to you.

4 A It was important to me because of what was

5 described. Without telling you the specifics about
6 the individual articles or how they came to the
7 attention of the Journal of the American Medical
8 Association --

9 Q You can tell us about the articles. Just
10 tell us about -- don't read from any of the
11 documents described in the articles or tell us the
12 contents of the documents that the article
13 describes.

14 A Okay. Let me see if I understand.

15 Q Yes.

16 A I think I can do it. I think I can do it.
17 And the point is this. There's an editorial in this
18 issue of the Journal of American Medical
19 Association. This editorial is something unique.
20 I've never seen it before, sort of thing. It was
21 signed by every editor of the Journal of American
22 Medical Association and every member of the board of
23 the American Medical Association.

24 And it said things that shocked every
25 doctor that read it and certainly shocked me. And

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1 when I read that documents that had come to the
2 attention of the American Medical Association
3 demonstrated that research conducted by tobacco
4 companies as to the deleterious health effects of
5 tobacco was often more advanced and sophisticated
6 than studies by the medical community and that

7 executives at Brown & Williamson knew early on that
8 tobacco use was harmful and that nicotine was
9 addictive and debated whether to make the research
10 public, that the industry decided to conceal the
11 truth from the public, that the industry hid their
12 research from the courts by sending the data through
13 their legal departments, their lawyers asserting
14 that the results were immune to disclosure and
15 litigation because they were privileged by a lawyer-
16 client relationship, that despite their knowledge to
17 the contrary, the industry's public position was and
18 continues to be that the link between smoking and
19 ill health was not proven, that they were dedicated
20 to determining whether there was such a link and
21 revealed this to us, the public, that nicotine was
22 not addictive.

23 When I read these things, and when I read
24 that it was the opinion of the entire board of the
25 American Medical Association and the entire

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1 editorial board of the Journal of American Medical
2 Association that the tobacco industry in general,
3 and Brown & Williamson in specific, had deceived the
4 American public and specifically deceived the
5 American medical community, I wanted to see what
6 they were talking about. I wanted to see exactly
7 which documents they were talking about. I wanted
8 to read them for myself.

9 MR. NYHAN: Your Honor. Move to strike.

10 (Side-bar conference held outside the
11 hearing of the jury)

12 MR. NYHAN: What we've had is a blatant
13 attempt to bolster his testimony through hearsay
14 opinion of all these other folks that he's just
15 described.

16 THE COURT: Do you intend to put the
17 journal into evidence?

18 MR. WILNER: Well --

19 THE COURT: Or the article?

20 MR. WILNER: It did come in in the last
21 trial in the Karbiwnyk case. It may be relevant. I
22 didn't offer it right this second as an exhibit, but
23 I suppose I could.

24 THE COURT: Well, no, I think I'd instruct
25 the jury at this point to disregard his statement

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1 that everybody signed it and everybody on the board
2 and everybody on the thing. I mean, why is that
3 permissible?

4 MR. WILNER: Well --

5 THE COURT: If the article is not going
6 in? I mean, so far we know that he read an article,
7 that everyone apparently who has any medical sense
8 at all agreed with, okay. And then he goes on to
9 say that that article says that Brown & Williamson
10 knew all of these things ahead of time. I mean --

11 MR. WILNER: If the objection is

12 hearsay --

13 THE COURT: It seems that --

14 MR. WILNER: -- I can rephrase it.

15 There's no problem.

16 THE COURT: He wants me to strike it. He
17 wants me to tell the jury to disregard that portion.

18 MR. WILNER: Okay. But, Your Honor, I
19 guess, and I understand it's Your Honor's position
20 that all objections be made here but, I mean, as I
21 understood it we can at least object and give
22 grounds. And if so, if there's a hearsay objection,
23 fine. We'll interrupt him and start again, I guess.

24 THE COURT: Well, the reason I asked you
25 to come over here this time, I can do it that way;

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1 but, I mean, if the book is going to go in anyway, I
2 would take a different view. It's obviously
3 hearsay, and I'd make you wait to do it. But I'm
4 going to tell the jury to disregard it and then
5 introduce it into evidence later, perhaps.

6 MR. NYHAN: But, Your Honor, I don't think
7 it's admissible.

8 THE COURT: I don't think it is either,
9 but that's why I'm asking him if it's going in.

10 MR. WILNER: Well, we know it got in -- it
11 was admissible and found to be admissible in the
12 last case because of -- I'm not sure why, because I
13 think there was some -- the door was opened by
14 something else.

15 THE COURT: It could be, but it hasn't
16 been; and I'm going to tell them to disregard the
17 opinions that Dr. Feingold has expressed that other
18 people have made certain determinations, okay?

19 MR. WILNER: Okay. Sure.

20 MR. NYHAN: And while we're here, we
21 object under Section 90706 to this attempt to use
22 what is purported to be an authoritative
23 publication. We can only do that on cross. He
24 can't do this on direct. This is improper direct
25 examination. And we ask that you strike the whole

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1 answer and tell the jury to disregard it, because
2 it's an improper use of this magazine. Counsel
3 should have known better. And I've already been
4 forced to make --

5 THE COURT: I think you could have asked
6 him, you know, what caused him to do that. I read
7 an article concerning it and I was so incensed that
8 I decided to do this.

9 MR. WILNER: Right.

10 THE COURT: But now you had him going to
11 tell what the article says, what it does. You know,
12 you've been very careful not to quote it.

13 MR. WILNER: That's right.

14 MR. NYHAN: But he did.

15 THE COURT: But he just summarized it.

16 MR. NYHAN: He's read it.

17 MR. WILNER: Well, whether a doctor can
18 summarize a learned treatise is a good question but
19 I'm --

20 THE COURT: He might be able to, but to
21 bolster his credibility as a witness, I don't think
22 you can do that.

23 MR. WILNER: Well, fine.

24 THE COURT: If that article is relevant to
25 this case in some other way other than to bolster

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1 Dr. Feingold's credibility, then that's what I was
2 talking about, I would allow it.

3 MR. WILNER: Sure.

4 THE COURT: But right now you're talking
5 about why he is doing this. You're not asking him
6 about this case. You're asking him about
7 Dr. Feingold and what is he doing here.

8 MR. WILNER: Right.

9 THE COURT: And he's saying I saw this
10 article --

11 MR. WILNER: Right.

12 THE COURT: -- that so incensed me that I
13 decided to do this.

14 MR. WILNER: Right.

15 THE COURT: And not only did it incense
16 me, everybody in the whole medical professional
17 agreed with it --

18 MR. WILNER: I agree. I think that's
19 gratuitous. I agree.

20 THE COURT: -- and signed it and
21 everything else. And so I'm going to tell them to
22 disregard that, that Dr. Feingold is here to give
23 his opinion, not anybody else's.

24 MR. WILNER: Absolutely. I agree.

25 (Side-bar conference concluded;

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1 (Proceedings resumed before the jury)

2 (Change of reporter, 5:10 p.m.)

3 THE COURT: Ladies and gentlemen, I'm
4 going to ask that you disregard that portion of
5 Dr. Feingold's statements where he gives opinions of
6 other people. He is here -- he's called as an
7 expert witness to give his opinion, but not the
8 opinions of other people.

9 Please disregard the statement that he
10 made concerning how everybody else thinks about it.
11 Okay. Go ahead, Mr. Wilner.

12 MR. NYHAN: That is also addressed to the
13 witness, Your Honor?

14 THE COURT: I think he understood that.

15 THE WITNESS: Should I disregard that; is
16 your question?

17 THE COURT: If you have a problem, you can
18 ask me, Dr. Feingold, not the attorney.

19 THE WITNESS: Yes, sir.

20 Q Dr. Feingold, don't tell us what any other
21 doctor felt, just tell us, in general, why that

22 article -- what effect that article had on you.

23 A Okay. Understand that the way science
24 works is to read and think what other people say.
25 They're not just giving opinions; they're just

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1 saying things based on what they themselves read and
2 study and think.

3 So the way science works is, you read and
4 think about what other people say. Now, analyze it
5 for yourself, and I give my opinion, and I certainly
6 agree with that. And my opinion is that the
7 documents of which the editorial of the American
8 Medical -- Journal of Medical Association spoke
9 demonstrated that the U.S. public and the medical
10 profession had been duped and that the people who
11 spoke for the tobacco industry had not told the
12 truth for many years and that which they said --

13 MR. NYHAN: Your Honor --

14 THE COURT: I'll sustain the objection.

15 Mr. Wilner maybe we ought to take a recess unless
16 there's a particular place you want to recess.

17 MR. WILNER: I will have ten more
18 minutes -- five more minutes.

19 THE COURT: All right. I'm going to ask
20 the jury to step back in the jury room for just a
21 minute then.

22 (Jury exits courtroom; proceedings
23 resumed, jury absent)

24 THE COURT: Dr. Feingold, I know you have

25 your reasons for being here and you are called as a

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1 witness to express your opinions, and you can give
2 your opinion. But what you have done is -- and
3 maybe not intentionally. I'm not saying you did it
4 intentionally -- but I have rules, too, that I have
5 to follow and apply to legal cases, okay?

6 THE WITNESS: Yes, sir.

7 THE COURT: And one of those rules is we
8 need your opinion. And you keep telling us that
9 everybody thinks this same way, you know. Everyone
10 in this article, that all of this was withheld. We
11 don't have dates; we don't have the article.

12 If you want to say that on the basis of
13 reading that article you decided that you needed to
14 come and testify on this issue, then I will allow
15 that. And that's what I was attempting to convey to
16 Mr. Wilner.

17 But if you want to say that you came here
18 to testify because everyone who signed that article
19 feels so strongly about it, I cannot allow that.

20 THE WITNESS: I understand.

21 THE COURT: Even it's a fact, I cannot
22 allow it --

23 THE WITNESS: I understand.

24 THE COURT: -- because they're not here to
25 be cross-examined as you are.

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1 THE WITNESS: I understand.

2 THE COURT: We're not trying to keep you
3 from expressing your opinion. We're trying to keep
4 you from, or I am, from expressing other people's
5 opinion at the same time.

6 The fact that everything you learned from
7 today back colors your opinion is no problem, okay?
8 All right. So if you bring them back in, please.

9 (Jury enters courtroom; proceedings
10 resumed, jury present)

11 THE COURT: All right, Mr. Wilner.

12 MR. WILNER: Thank you.

13 Q Dr. Feingold, don't tell us what the
14 documents say, and don't tell us your motivation for
15 being here. But just tell -- tell us in general,
16 did that article have an effect on you.

17 A Yes.

18 Q And did that lead to your doing further
19 study about cigarette medicine, including
20 nonpublished or material from the cigarette
21 industry?

22 A Exactly. I promptly obtained documents of
23 which the editorials spoke.

24 Q And did you obtain sets of documents
25 through -- well, through different means?

1 A Yes, multiple different means.

2 Q Don't tell us what the documents say.

3 Just tell us, in general, how you went about
4 collecting these.

5 A Well, the first set was easy, because the
6 set of documents that's discussed in this issue of
7 the Journal of American Medical Association was
8 available on CD rom. So there was a disk, a CD rom
9 disk that I obtained shortly after -- I don't recall
10 exactly -- but shortly after this was published, and
11 I began to read some of the articles that were
12 mentioned.

13 Subsequently, there were texts, things
14 that were written by other people that identified
15 some of the documents on that CD rom, because there
16 are many, many documents, and it's hard to find
17 individual ones.

18 So some people started to publish work
19 about these documents, and I went and I read them
20 for myself. Beyond that, evolved -- there's been an
21 evolution since this. This is back in 1995 when
22 there was a text -- there was a text published in
23 1996.

24 And subsequent to that, really, very much
25 on the Internet. There was a huge growth of --

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1 source of documents and, furthermore, when some
2 legal actions were initiated in the United States,

3 specifically some state cases against the tobacco
4 industry, the Attorneys General started to put
5 documents that they had received on the Internet
6 available to whoever wanted to read them. So I
7 began to obtain them that way.

8 Q And did you do anything special with your
9 computer or your home computer or office computer so
10 you could do this kind of work?

11 A Of course I had to down load a variety of
12 readers. These are different devices used to look
13 at some of these documents. I had to search the
14 different Internet sites. I had to find them, and
15 then I had to study these documents.

16 And beyond this, I should also say that I
17 received documents, actually paper copies, from many
18 different sources. I received them from your
19 office, I received them from the State of Florida --
20 attorneys representing the State of Florida in their
21 action against the tobacco industry. I obtained
22 them from the State of Mississippi, attorneys for
23 the State of Mississippi. I have obtained them from
24 other attorneys, as well.

25 Q And do you have -- have you, in addition,

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1 gone back and gone further into the published
2 literature as a result of what you found in the
3 unpublished documents?

4 A Well, I was already familiar in the
5 mid-1990s with some of the medical literature, very

6 familiar with some of the old medical literature.
7 But this whole process prompted me to go all the way
8 back and start from the beginning and reevaluate
9 what was available, for example, 1950s and 1960s and
10 so on, all the way up to the present time, because
11 there are things that I learned from the previously
12 received documents that I didn't know, that I'd
13 never known.

14 Q Well, did you actually go back then to the
15 library and work and try to find out, for instance,
16 when doctors or scientists first discovered that
17 cigarettes could cause disease?

18 A Yes, this is --

19 Q Don't tell us what the answer is.

20 A No, no, no. That's for later.

21 Q And is that part of -- did that become
22 part of the, to use a modern term, the database that
23 you base your opinions on?

24 A Yes. The result was I went back to the
25 very earliest articles. Some of them were discussed

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1 in various documents. I went back to these earliest
2 articles, obtained them. Some of them are hard to
3 get because they're in very old medical journals.

4 And using various resources, I collected,
5 made a collection of many, many journal articles
6 that had been published in the medical literature
7 and texts and so on, and I study those going from --

8 well, some are in the '30s, but mostly from 1941 up
9 until the present time.

10 Q And have you been asked to testify in this
11 trial on that question of when doctors proved or
12 knew at different times, years, and when that
13 knowledge was available?

14 A Yes.

15 Q And have you also been asked to look
16 through and study, as a scientist and a doctor, the
17 medical records and history of Mr. Maddox to see
18 what caused him to die?

19 A What happened to him?

20 Q Yes.

21 A Yes.

22 Q And were you asked specifically to
23 determine whether or not cigarettes caused his
24 death?

25 A I was asked to do that, yes.

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1 Q And were you also asked to look at both
2 published literature and internal documents to
3 determine whether the American Tobacco Company had
4 sufficient knowledge at certain years to issue
5 warning to its customers?

6 A I was asked to do that, yes, and I did.

7 Q And is that true for Brown & Williamson,
8 too?

9 A Correct.

10 Q Were you also asked to determine whether

11 or not American Tobacco and Brown & Williamson
12 entered into any sort of agreement between
13 themselves and with other parts of the industry to
14 do any purposes that the plaintiff charges are
15 improper?

16 A Yes, I was asked to do that. To determine
17 from a medical point of view --

18 MR. NYHAN: Objection, Your Honor; no
19 foundation.

20 MR. WILNER: Right. We're not --

21 Q I'm not going to ask you what your answer
22 is. I just asked you if you were asked to do that.

23 A Okay. Yes, I was asked to do that, yes.

24 Q And have you testified in previous cases
25 brought by injured parties against the cigarette

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1 industry --

2 MR. NYHAN: Objection; irrelevant.

3 MR. WILNER: We'll withdraw it, okay.

4 Q Were you asked by the Maddox family to
5 come up here and discuss those issues, among others,
6 with this jury?

7 A Yes, sir.

8 Q And do you intend to charge the Maddox
9 family for your time?

10 A No, I do not.

11 Q And are you prepared to stay until
12 tomorrow to discuss these issues with the jury?

13 A I am prepared, and I think it's my duty to
14 stay as long as I need to.

15 MR. NYHAN: Objection, Your Honor, on the
16 ground previously stated.

17 THE COURT: Okay. I'll sustain the
18 objection.

19 Q Are you prepared -- regardless of whether
20 it's your duty, are you prepared to stay here until
21 tomorrow?

22 A Yes, I'm prepared to stay here until
23 tomorrow or whenever.

24 MR. WILNER: Your Honor, it's a good time
25 now if we might take a recess.

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1 (Side-bar, Court and counsel)

2 THE COURT: Ladies and gentlemen, we're
3 obviously going to break for the evening at this
4 point and ask that you be back in the jury room at
5 9:00 tomorrow morning.

6 Please do not discuss the case among
7 yourselves or with anyone else. And we should be
8 able to start right at 9:00. Tomorrow is the first
9 day I don't have hearings set before the trial. So
10 we'll be in recess, as far as the jury is concerned,
11 until 9:00 tomorrow morning.

12 (Jury recessed until 9:00 a.m. ;
13 proceedings resume, jury absent)

14 MR. WILNER: Your Honor, we want to submit
15 a -- that is an order from the State of Minnesota

16 case on the issue of privilege, and yours is coming.

17 MR. NYHAN: Can I have a copy?

18 MS. HARTLEY: As soon as we get to the
19 office.

20 MR. NYHAN: It's coming here now?

21 MR. WILNER: We're not going to argue it
22 now.

23 THE COURT: Let me ask you this. Do we
24 need to meet earlier than 9:00 to argue this?

25 MR. NYHAN: Your Honor, we have urged

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1 plaintiffs to let us know what privileged documents
2 they're using with each witness. Now, apparently,
3 there are several binders that are coming up. This
4 constantly gets postponed and rolled --

5 MS. HARTLEY: I did this last night.

6 MR. NYHAN: -- and we want the Court to be
7 aware of our objections to be put in this prejudiced
8 situation where they're already into this issue.

9 THE COURT: Let me ask Mr. Wilner. Do you
10 expect to use any of the privileged documents with
11 Dr. Feingold tomorrow?

12 MR. WILNER: Well, there are no privileged
13 documents; there are claims of privilege. And, yes,
14 we will eventually get to them.

15 THE COURT: When I say "privileged," the
16 alleged privileged documents?

17 MR. WILNER: Alleged privileged. Yes,

18 possibly. Not necessarily, but possibly, depending
19 on how fast we're going.

20 THE COURT: Well, let me say this. I
21 don't want to recess to have an hour argument on
22 it. I'd rather start at 8:00 and argue from 8:00 to
23 9:00 and --

24 MR. WILNER: Here's the problem, Your
25 Honor -- and I hate to interrupt. I can't -- I

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1 think we will spend endless time trying to establish
2 the context of the documents. I would prefer to
3 have the witness establish what I -- if necessary,
4 predicate.

5 Because part of my -- on a few documents,
6 and I may not even use those. See that's why. We
7 could have long hearings and not even use those
8 documents.

9 THE COURT: I don't have a problem with
10 not having long hearings. I have a problem with
11 having long hearings between 10:00 and 11:00 or 2:00
12 to 3:00 in the afternoon, and that's what I'm
13 talking about.

14 MR. WILNER: Here's the point. We --
15 there are several of the claimed privileged
16 documents which the issue is only whether they are
17 facially privileged. In other words, there's not a
18 crime fraud. We don't claim the necessity for the
19 crime fraud exception.

20 We think they're just not authored by

21 attorneys, they don't go to attorneys, they're not
22 about legal things. So they are fairly simple.
23 There may be a few. And that is what -- it's kind
24 of hard to tell because of the timing, but it may be
25 that we would reach some that we say, We accept that

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1 they're from attorneys to attorneys, but they're
2 part of a crime fraud.

3 THE COURT: Maybe we can do it during
4 lunch tomorrow.

5 MR. WILNER: Maybe so. And the reason I'm
6 continuing to speak is in order for me to lay the
7 predicate of the crime fraud, I can't just go in and
8 start talking to Your Honor and say, Well, here's
9 why I think there was a fraud; and they'll say,
10 Well, no, I don't think there was a fraud. And I
11 don't know where we'd get.

12 I think that I have to, to protect the
13 record, lay out why this -- if that exception is
14 necessary -- and I think it's only a very few
15 documents. The rest of them are either unprivileged
16 or we think we can dispose of them on issues on
17 their face. But for this, I think I have to put
18 evidence on, and I don't think I can do it just by
19 talking. That's the problem.

20 THE COURT: Maybe I don't understand.
21 Because what I was under the impression of was that
22 there were many documents that a paralegal named

23 Williams -- I forget his first name, unusual first
24 name.

25 MR. WILNER: Merrill Williams.

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1 THE COURT: Merrill Williams, right. And
2 I guess, put this on the record, because I had seen
3 a Frontline article about the Mississippi case and
4 the lawyers there and Dick Scruggs and so forth.

5 MR. WILNER: There are three out of that
6 whole set that are claimed privileged.

7 MS. HARTLEY: That have already been
8 entered in evidence.

9 THE COURT: So I don't know if I have the
10 accurate information. That's why I'm talking to
11 both of you on the record. But apparently, somehow
12 they got on the Internet from a professor in
13 California and have become, at least -- not public
14 record -- at least accessible to the public.

15 MR. WILNER: Right.

16 THE COURT: So there's a question about
17 whether you can use them if you came by them
18 legally, even if someone else didn't. And, also,
19 there is a question about whether or not they were
20 actually introduced in Minnesota.

21 And I know that that doesn't mean if you
22 had a privilege there, you didn't waive it. So I
23 don't mean to imply that.

24 But what I am talking about, these are
25 general questions, are they not?

1 MR. WILNER: Not really, because --

2 MR. NYHAN: We disagree with that. We
3 have been asking for a hearing on the privilege
4 issue since the first day we saw you. We haven't
5 had it yet, and we think we should all get in at
6 8:00 and talk about what's really at issue.

7 We have other objections to the documents
8 that they still want to offer that haven't been
9 resolved yet. So we think we need to do that at
10 8:00 tomorrow morning so as not to waste the jury's
11 time.

12 MR. WILNER: We will go anywhere, but I
13 need -- I intend to lay a predicate for any
14 document. I'll be happy to go in at 8:00 and start
15 talking about documents, but I don't think that that
16 is going to be enough. On some -- I think that
17 these documents, the very same ones, have already
18 been -- we've already been through this in the
19 Carter case with Judge Davis.

20 We laid the predicate, we offered -- if
21 we're talking about the Merrill Williams documents,
22 we offered our package of documents. The same
23 objections were made, they were ruled on; that
24 matter is now pending in the district court of
25 appeal on the defendant's appeal.

1 THE COURT: Well --

2 MR. WILNER: All that stolen document
3 stuff.

4 THE COURT: The Minnesota documents are
5 different from Merrill Williams?

6 MR. WILNER: Yes. What I mean -- of
7 course some overlap. But let's first -- if I could
8 take three minutes, I could clarify this.

9 THE COURT: I'm here.

10 MR. WILNER: Okay. The first set that he
11 talked about -- let's call those the Merrill
12 Williams documents. Those were the subject of the
13 defendants' objections that they were stolen. They
14 were the paralegal who took them and sent them to
15 the University of California.

16 THE COURT: Well, I didn't think that they
17 were the same as the Minnesota documents because of
18 what was said on that Frontline program. Obviously
19 that, no --

20 MR. WILNER: I didn't see the Frontline.

21 THE COURT: -- that they had access to the
22 documents and that helped them when the professor
23 put them on the Internet.

24 MR. WILNER: All right. So those were
25 around 1994, 1995. They were the subject of the

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1 editorial. Those have already been ruled on as far

2 as the general issues in this county and in this
3 state.

4 Judge Davis had the same kind of a hearing
5 on are they -- is there some global defect in them
6 and, specifically, on the -- there were three
7 documents or two documents that were claimed
8 attorney/client privilege, and those were ruled on.

9 THE COURT: Mr. Wilner, you can argue
10 that.

11 MR. WILNER: I understand, but --

12 MR. NYHAN: Let's do it tomorrow at 8:00.

13 THE COURT: But what I'm talking about is
14 giving them a hearing, not necessarily giving them
15 an order.

16 MR. WILNER: I understand. So the next --
17 there are other sets of documents, which we refer to
18 as Minnesota documents. Now those are not
19 necessarily the same. That's fine. I'm happy to do
20 it. We can come in at 8:00, and we'll lay all that
21 out.

22 THE COURT: Let me ask you a question. Do
23 you have any documents from the Minnesota documents
24 that did not go into evidence in Minnesota?

25 MR. WILNER: Certainly, some.

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1 THE COURT: Okay. So you have some that
2 have not been ruled on by any court --

3 MR. WILNER: Correct.

4 THE COURT: -- prior to --

5 MR. WILNER: I think that's probably
6 right, although I know the Minnesota judge --

7 THE COURT: What I'm saying is that's a
8 different category. He made them produce them all.
9 I understand that.

10 MR. WILNER: He made them produce them
11 overruling their privilege claims, although they
12 weren't --

13 MS. TERRY: Under very different
14 circumstances.

15 MR. WILNER: -- offered in evidence, they
16 were produced and the privilege claims were
17 overruled by that order.

18 MR. NYHAN: And some of those -- the
19 grounds for some of those courts' decisions were in
20 a position of sanctions, not necessarily based on
21 the merits.

22 So there was an awful lot going on in
23 Minnesota. And for what reason, Judge, we don't
24 think you can do it on the fly, and we don't want to
25 proceed to have these documents argued while the

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1 witness is on the stand, he's trying to get them in
2 and the jury's waiting.

3 THE COURT: Let me ask you if you can do
4 this. Can you identify those that you might use
5 tomorrow?

6 MR. WILNER: Yeah.

7 THE COURT: Not now or -- I don't mean
8 right this minute.
9 MR. WILNER: Within an hour or two.
10 THE COURT: Okay. And we could meet at
11 8:30 in my office --
12 MR. WILNER: Okay.
13 THE COURT: -- and discuss overall
14 privilege and whatever.
15 MR. WILNER: Okay.
16 MR. NYHAN: All right.
17 THE COURT: And I will try -- I don't know
18 if I'm going to be able to read even this whole
19 order.
20 MR. NYHAN: Can I see what we have so I
21 can see what we need to address?
22 MR. WILNER: It's the Minnesota order.
23 MR. WILNER: This is being sent to your
24 office. I just didn't have an extra copy.
25 MR. NYHAN: We were told that the video

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1 was sent, too. That's the only reason I asked. Let
2 me just make a note of what we have. Do you have
3 this, Jackie?
4 MS. TERRY: I got it all.
5 MR. NYHAN: The problem is we get stuff
6 after it's argued --
7 MR. WILNER: Counsel, I won't get into
8 that with you, sir.
9 MR. NYHAN: Do you mind if I take a moment

10 to see what we have?

11 THE COURT: Let's go off the record.

12 (The trial was recessed until 8:30 a.m.,

13 May 22, 1998)

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